Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 76-636

BUCKLEY TOWERS CONDOMINIUM, INC.,
a non-profit Florida condominium corporation,
on behalf of itself and its members-unit owners,

Petitioner

vs.

HERBERT BUCHWALD, individually and as
trustee, and BUCKLEY DEVELOPMENT
COMPANY, LTD.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

CASE NO.

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida condominium corporation, on behalf of itself and its members-unit owners,
Petitioner

versus

HERBERT BUCHWALD, individually and as trustee, and BUCKLEY DEVELOPMENT COMPANY, LTD.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Buckley Towers Condominium, Inc., a non-profit Florida Condominium corporation, on behalf of itself and its members-unit owners, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 17, 1976, reported at 533 F. 2d 934 (5th Cir. 1976), reh. den. September 21, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 533 F.2d 934 (5th Cir. 1976). The opinion of the United States District Court for the Southern District of Florida appears at 399 F. Supp. 38 (U. S. D. C. So. Fla. 1976).

JURISDICTION

The Judgment of the Court of Appeals (App. 9) was

entered on June 17, 1976. A timely Petition for Rehearing with a suggestion of rehearing en banc was denied on September 21, 1976 (App. 12). This Courts jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

STATUTES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. 1) provides in part:

> "Every contract...in restraint of trade or commerce among the several states...is declared to be illegal..."

Section 2 of the Sherman Act (15 U.S.C. 2) provides in part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states..."

Section 15 of the Sherman Act (15 U.S.C. 15) provides in part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any District Court of the United States in the District in which the Defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained..."

Section 26 of the Sherman Act (15 U.S.C. 26) provides in part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any Court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the Antitrust Laws, including Sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against theatened conduct that will cause loss or damage is granted by courts of equity..."

Section 2201 of the Declaratory Judgment Act (28 U.S.C. 2201) provides in part:

> "In a case of actual controversy within its jurisdiction...any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought..."

QUESTIONS PRESENTED

I. Does a non-profit corporation, which is a party to a business contract with a profit making entity have standing to bring an action under the antitrust laws on behalf of itself and/or on behalf of its membership for declaratory judgment and other relief, alleging antitrust violations arising from the business contract.

II. Does the filing of an independent antitrust complaint by a member of a non-profit corporation preclude the right of the non-profit corporate entity from appellate review of the dismissal with prejudice of a prior action filed by the non-profit corporate plaintiff.

III. Can a statute or law of the State of Florida, incorporated by reference in a private contract or agreement between two parties, effectively preclude the application of the anti-trust laws of the United States to the private contract.

STATEMENT

Buckley Towers Condominium, Inc., is a non-profit corporation formed under the laws of the State of Florida and is vested with general corporate powers, and additional powers granted Condominium Corporations in Fla. Stat. 711.12, (App. 1), (App. 3).

Buckley Towers Condominium, Inc. is merely one of thousands of condominium corporations or associations which were incorporated pursuant to the foregoing statutes in the State of Florida and similar statutes in other states, in order to conduct the affairs, contract for and, generally, have the responsibility for all legal and other matters concerning condominiums.

The Condominium concept necessarily arose since ownership of a private, single-family residence has become financially impossible for the average wage earner or elderly retired in the United States, spawning the need for alternate types of residential housing, including the explosive growth of condominiums.

No national legislation or policy existed or exists for the regulation of condominiums, which left seekers of housing subject to the mercy of and reliance upon the individual condominium developers, usually corporate entities. As a result, developers were able to, and continue to, impose onerous contracts and agreements on the development.

In the instant case, which is concededly substantially similar to a myriad of other condominium developments, the builders-developers of the Buckley Towers Condominium directly or indirectly controlled all entities responsible for the building and initial operations of the Buckley Towers Condominium, including interrelated and controlled corporations responsible for the construction, sale and operation of the Condominium and instituted both short and long term contracts (some exceeding 90 years in length) on the development.

Among the contracts entered into in the beginning stages of the Buckley Towers Condominium development, through entities which were wholly and absolutely controlled by the respondents in this case were:

1. A mandatory ninety-nine (99) year lease agreement for "recreation areas" between respondent, Herbert Buchwald, Trustee and Petitioner, which required, among other things, payment of the last two months of the 99 year term, monthly rentals in excess of $18,000.00 per month, to be increased pursuant to the consumer price index at periodic intervals for the entire term of the 99 year lease with payment of the lease not being discretionary but absolutely required of the Condominium Association, Petitioner herein, for the entire 99 year term, including payment of all costs of the lease, maintenance, repairs, legal fees, etc.

2. A long-term managment agreement which provided that the developers of the Buckley Towers Condominium, through controlled entities, be permitted to manage the condominium association for many years and which provided for fees to be paid

> to the mangement company solely on the basis of monies expended by the management company and without regard to the efficient management of the condominium or any other criteria.

The rental and other costs of the 99 year "recreational lease" was concededly set without any basis or relation to the cost of the improvements contained in the "recreational lease area" and is hugely in excess of any reasonable return for the premises when computed by any rational or commonly used formula of any nature.

The lease was entered into by developer-controlled entities at the time that Buckley Towers Condominium, Inc., Petitioner, was controlled solely and absolutely by designees of the respondents and the membership of Petitioner was permitted absolutely no voice or control in the setting of the terms of the 99 year lease or the desirability of entering into the lease in the first instance. The lease contract was imposed on petitioner by respondents.

Petitioner is the lessee on the lease contract complained of below and the individual members-unit owners of petitioner are contractually bound as guarantors of the performance of petitioners. Members are obliged to pledge the ownership interest in their individual condominium dwelling units, on a continuing basis, to guarantee the performance of the 99 year "recreation" lease.

When the lease contract became too onerous for Petitioner to bear, Petitioner filed suit on behalf of itself and its members, in the United States District Court for the Southern District of Florida for relief from the continuing lease contract, alleging that it was continually violative of the antitrust laws of the United States and that, as a result of such

continuing violations, Buckley Towers Condominium, Inc., on behalf of itself and its membership-unit owners, was entitled to relief from the continued imposition of the contract, damages and other relief.

Respondents, Herbert Buchwald, individually and as trustee-lessor, and Buckley Development Company, Ltd., moved to dismiss the action for lack of jurisdiction, alleging, among other things, plaintiff's lack of standing to sue as a person injured in its business or property (App. 4).

Plaintiffs, responded to the Motion to Dismiss (App. 5) and moved for an evidentiary hearing as to the jurisdictional matters involved in the cause (App. 6).

The Court denied the defendants motion for evidentiary hearing on the question of jurisdiction (App. 7) and entered an Order of Dismissal (App. 8).

Ultimately, an appeal from the Order of Dismissal was taken to the United States Court of Appeals, Fifth Circuit, and, in an opinion rendered on June 17, 1976, reported at 533 F. 2d 934 (5th Cir. 1976), (App. 9), the United States Court of Appeals affirmed the dismissal, finding that a non-profit Condominium corporation does not have standing to sue on behalf of itself and/or its membership in an action predicated upon the violation of the antitrust laws of the United States, even though the condominium corporation is a party to a contract claimed to be illegal, since the condominium association is only "nominally liable" for the payment of the contract and for the additional reason that in the strict sense, a non-profit Condominium Corporation has no commercial interests or enterprises and additionally, could not "demonstrate a loss or injury cognizable in equity approximately resulting in the alleged antitrust violations, even under

the eased requirements of Section 16 (15 U.S.C. 26)".

Additionally, the appellate court apparently reasoned that since a suit had been brought by an individual residing in the Buckley Towers Condominium Complex, after the dismissal of the instant cause which also alleged violations of the anti-trust laws of the United States, (Ignatz Spitz, etc., et al., vs. Herbert Buchwald, etc., et al., S. D. Fla. 75-1549- Civ-JLK, dismissed with prejudice) (App. 10), that this too was sufficient reason for the denial of review and upholding the dismissal of the anti-trust action below.

The Court of Appeals based its decision upon 7 representative cases relating to standing:

Battle vs. Liberty National Life Insurance Company, 5th Cir. 1974, 493 F. 2d 39, cert. den., 1975, 419 U.S. 1110, 95 S. Ct. 784, 42. L. Ed. 2d 807.

Hawaii vs. Standard Oil Company of California, 1972, 405 U.S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184.

Dailey vs. Quality School Plan, Inc., 5th Cir. 1967, 380 F. 2d 484.

Martin vs. Phillips Petroleum Company, 5th Cir. 1966, 365 F. 2d 629, cert. den. 385 U.S. 991, 87 S. Ct. 600, 17 L. Ed. 2d 451.

Zenith Radio Corp. vs. Hazeltine Research, 1969, 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2nd 129.

Geoffry vs. Southwestern Bell, 5th Cir. 1975, 518 F. 2d 1129.

Credit Bureau Reports,Inc. vs. Retail Credit Company, 5th Cir. 1973, 476 F. 2d 989.

The holding concluding that Buckley Towers Condominium, Inc., was not a "purchaser" of a condominium unit or owner of a unit at the time the complaint was filed and therefore could not state a claim upon which relief could be granted, even though it was a party to the contract in quo and could be sued on the contract in State court.

The Court apparently did not feel it necessary to take into consideration applicable portions of the Corporate Charter, the Declaration of Condominium, State Statutes and other authority giving the Petitioner Condominium Association the right to maintain a suit on behalf of itself and/or its membership in matters of common interest. Nor did the Court of Appeals recognize the right of a corporate condominium association to maintain a suit in its capacity as a party to a contract claimed to be violative of the antitrust laws of the United States.

The decision has effectively denied access to the United States District Court to condominium corporations throughout the United States which seek redress for antitrust violations arising from contracts imposed on them.

The wide application of the ruling, already cited as authority for lack of standing on the appellate level, necessitates this application for Writ of Certiorari on behalf of the Petitioner Condominium Association and its membership.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals failed to recognize the ample precedent in other circuits permitting, and

> the necessity for permitting, a corporate condominium association standing as a party to a contract and as the reasonable representative of all of its members-unit owners, to seek relief for claimed antitrust violations arising from the mandatory imposition of the contract.

The main premise of the adverse decision below appears to be that a non-profit condominium corporation lacks standing to sue for injury to itself or its members-unit owners since:

> (1) It is not the proper representative for its members-unit owners.
>
> (2) A condominium corporation cannot suffer damage or injury to its business or property in the sense required for standing contemplated by the antitrust laws of the United States.

The decision appears to conflict with (1) decisions of other Courts of Appeal and (2) decisions of this Court concerning questions of standing. The question involved is substantial since many thousands of similar condominiums and non-profit entities will be affected and a basic necessity of life, housing, is involved. It should be heard and decided by this Court.

Since a mandatory 99 year lease is involved, there can be no argument with the proposition that *prospective* relief is sought by petitioner, in addition to any damages which may be found.

Assuming *arguendo* that Petitioner is not "injured in its business" Petitioner may still have standing pursuant to 15

U.S.C. 26 to seek injunctive relief designed to prevent harms which may be unrelated to competition, when that relief serves the antitrust function of ending ongoing violations. *Georgia vs. Pennsylvania R. Co.* 1945, 324 U. S. 439, 65 S. Ct. 716, 89 L. Ed. 1051. In *Georgia vs. Pennsylvania, supra,* this Court held that the State of Georgia could seek relief to enjoin certain railroad companies from conspiring to fix discriminatory railroad rates to the detriment of the State of Georgia's economy. The 9th Circuit has adopted and followed this proposition which distinguishes standing requirements for *prospective* relief as opposed to the standing requirements for *past* damages. *In re: Multidistrict Vehicle Air Pollution: State of Washington, et al vs. Automobile Manufacturers Association, et al.,* 9 Cir. 1976, 538 F. 2d 231., at 237, noting that:

> "The ommission of the words "business or property" in Sec. 16 certainly makes that section "far broader that (sic) Sec. 4." *Hawaii vs. Standard Oil Company,* 9 Cir., 1970, 431 F. 2d 1282, 1284, aff'd. 1972, 405 U. S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184.

It can not follow that when Congress adopted Sec. 16 (15 U.S.C. 26) it intended to permit remedies which would serve none of the purposes for which the law was passed.

Plaintiffs who have not been injured in their *business* or property, do have standing to seek injunctive relief designed to prevent harm which may be unrelated to competition, when that relief serves the antitrust function of ending an ongoing violation.

Like Petitioner, a State is not an enterprise for profit nor is it generally regarded to be in the commercial sector. A

state is a non-profit entity.

The 7th Circuit in a recent decision has found standing on behalf of the State of Illinois in a treble damage action, even though the State of Illinois was not a direct purchaser to the products involved (concrete block) but instead purchased buildings of which the concrete block was merely a partial component.

In *reversing*, The District Court's dismissal of the action, the 7th Circuit stated:

> "In private actions seeking to vindicate rights conferred by Congressional Enactment, to establish standing the Plaintiff must show an injury in fact that is "arguably within the zone of interests to be regulated by the statute." *Association of Data Processing Service Organization, Inc. vs. Camp*, 397 U. S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184; *Malmud vs. Sinclair Oil Company*, 521 F. 2d 1142, 1151-1152 (6th Cir. 1975); *State of Illinois vs. Ampress Brick Company, Inc.*, at 1165.

The 7th Circuit, in electing to follow the standing requirements of the 6th Circuit, 9th Circuit and this Court, cited the "broad reach of a treble damage action under the Sherman Act as stressed in *Mandaville Island Farms, Inc. vs. American Crystal Sugar Company*, 334 U. S. 219, 236, 68 S. Ct. 996, 1006, 92 L. Ed. 1328", where the, "Supreme Court noted that the Sherman Act does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.... but held that the Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

In fact, contrary to the privity requirement now prevailing in the 5th Circuit, other circuits and, apparently this Court, *have removed the privity requirement* in an antitrust cases for purposes of standing. *In re Multidistrict Vehicle Air Pollution M. D. L. #31* (9 Cir. 1973), 481 F. 2d, 122, at 129; *South Carolina Council of Milk Products, Inc., vs. Newton*, (4 Cir. 1966), 360 F. 2d 414, 417-418, cert. den. 385 U. S. 934, 87 S. Ct. 295, 17 L. Ed. 2d 215 (1966); *Armco Steel Corp. vs. North Dakota* (8th Cir. 1967), 376 F. 2d 206, 210-211.

The 5th Circuit, in its decision denying standing to Petitioner in this instance, squarely held that standing under Sec. 4 of the Clayton Act, is limited exclusively to first-line purchasers, even though the plaintiff below, the corporate condominium association, which was a *party* to the lease contract complained of is liable for payments under the lease, and is the entity which bears the burden of the illegal 99 year contract for the unwanted "recreational facilities."

Respectfully, the 5th Circuit misapplied the decisions upon which it relied to deny Petitioner standing. The misapplication is understandable since:

> Standing, ...is still in the course of development in the law. (citations omitted), in re *Western Liquid Asphalt cases: State of Alaska, et al vs. Standard Oil Co. of California, et al.*, 9 Cir. 1973, 487 F. 2d 191, cert. den. 94 S. Ct. 1419 (1974).

The 9th Circuit, in elucidating further on the question of standing also stated:

> "Direct proof of payment is not required, of course, because to require it could prevent enforcement of

the antitrust laws. *Bigelow vs. Arko Radio Pictures, Inc.*, 237 U.S. 251, 264-265, 66 S. Ct. 574, 90 L.Ed. 652 (1946), *in re Western Liquid Asphalt Cases, supra, at 200.*

The 5th Circuit rejects the position of the 9th, 6th and 7th Circuits, creating conflict among the circuits.

Petitioner is the *lessee* of the 99 year lease contract complained of in its suit before the United States District Court.

It would appear that the causal relationship is obvious from the complaint (App. 11). Privity, though not even required in other circuits, exists in this case and the claim for prospective relief as well as damages, is also apparent.

It is difficult to understand how a continuing course of events and contracts...conceived, executed and set in force for a period of 99 years by the respondents should now be used as a shield by respondents and the Courts to deny standing to a corporate entity which is clearly responsible, by the very terms of the contract complained of, for payment of enormous sums of money each year to defendants.

II. Can a statute or law of the State of Florida, incorporated by reference in a private contract or agreement between two parties, effectively preclude the application of the antitrust laws of the United States to the private contract.

The State of Florida has eradicated any distinction whatsoever between a non-profit condominium corporation and a corporation for profit and defendants-respondents, who operate in Florida, should not now be permitted to raise the non-profit status of petitioner, which was caused by respon-

dents, as a defense to petitioner's standing. *Fountainview Association, Inc., #4, a Florida corporation not for profit, and Fountainview Association, Inc., #5, A Florida corporation not for profit vs. Bell, et al.*, 203 So. 2d 657 (Fla. App. 1967).

> "...in the enactment of the Florida Condominium Act, the legislature chose to permit an association that operates such a project to function as, but not limited to, a corporation for profit and as a corporation not for profit. See: 711.12(1) Fla. Stat., F.S.A. Therefore, in construing the Statute, it is apparent that the legislature considered that each of the same class should be treated equally...therefore, although the promoters caused corporations not for profit to be organized, they could have organized corporations for profit and we hold that their conduct is governed by the rules applicable to private corporations for profit..."

Petitioner's damage is not merely incidental or inconsequential, nor can it seriously be questioned that its very existence is mandated solely for the purposes of representing its members-unit owners, in contractual matters, litigation, etc. Were this not the case, there would be absolutely no reasons for the initial formation or the continuance of Petitioner as an entity recognizable in law.

Since no evidence on these substantial questions was permitted to be proffered or placed before the Court by testimony, or other proofs, (App. 7), it would appear that Petitioner has been improperly denied access to the Courts to vindicate a right vested in it by the antitrust laws of the United States.

The conclusion by the Court of Appeals that Plaintiff is not an entity in the commercial sphere is unfounded in fact and contrary to the proofs which were not allowed to be presented. Evidence should have been permitted on this question since a Condominium Association with more than 1000 unit owners has a yearly budget in excess of that of may municipalities, with the attendant purchases, contractual obligations, assessments, collections, etc.

In fact, Buckley Towers Condominium, like each of the thousands of other condominiums in the United States, must operate profitably and meet its obligations or be subject to the attendant commercial sanctions, including, but not limited to bankruptcy, suits at law, etc.

SAVING OF JUDICIAL LABOR

If Petitioner were permitted to maintain the action below on behalf of itself and its mandatory membership (unit owners), the action would effectively end the necessity for Petitioner's members to guarantee Petitioners' performance of the 99 year lease contract and would obtain complete relief for all members of Plaintiff as well as Plaintiff itself. *National Motor Freight Traffic Association vs. United States,* 372 U.S. 246, 9 L. Ed. 2d 709, 83 S. Ct. 688 (1963); *Association of Data Processing Service Organization, Inc. vs. Camp,* 397 U.S. 150, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970), *Warth vs. Seldon,* 1975, 422 U. S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343. One injunction is as good as 1000 injunctions.

As a party to the objectionable contract, coupled with the fact that Petitioner exists solely for the benefit of its members-unit owners, it is axiomatic that individual participation of each of petitioners members is not necessary or indispensible to a proper resolution of the cause before the United States District Court.

In fact, a favorable result achieved by Petitioner would obviate the need for separate suits by each of the individual members in addition to voiding the objectionable mandatory contractual entanglements.

III. Did the District Court abuse its discretion or err by refusing to allow Buckley Towers Condominium, Inc., to file an amended complaint in the cause or join such parties as, in the view of the District Court were necessary to be joined in the action as proper parties plaintiff.

Petitioner could not be a member of any class action instituted by any of its members-unit owners. In fact, Respondents take the position that no unit owner of petitioner can bring an action on behalf of petitioner (Fla. Stat. 711.121) since "no unit owner may act for the Association."

The Court of Appeals appeared to be of the view that an action instituted by one of the unit owners might preclude the necessity for petitioners joinder in or bringing an antitrust action, however, the District Court also dismissed that suit (App. 7).

Since the dismissal below was for failure to state a claim upon which relief could be granted, without any responsive pleading having been filed or required and no judgment entered, it would appear that an amended complaint should have been permitted as a matter of right or proper discretion. *Costello vs. United States,* 365 U.S. 265, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961):

> "...we think that...if the first suit was dismissed for defective pleadings, or parties, or a misconception of a form of proceeding, or the want of jurisdiction, or was disposed of on any grounds which did not go to the merits of the action, the judgment rendered will prove no bar to another suit... we do not discern in Rule 41(b) a purpose to change the common law principal with respect to dismissal in which the merits could not be reached for failure of the Plaintiff to satisfy a precondition." *Costello, supra, at 545.*

See also: e.g. *Conley vs. Gibson,* 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1960).

There appears to be no serious question that the practices complained of in the complaint below, if proven, constitute per se violations of the antitrust laws of the United States. *Miller, et al vs. Granados,* 5th Cir. 1976, 529 F. 2d 393, (setting forth the proposition that mandatory contracts entered into by a Condominium Association of the type involved in the cause below would, if proved, constitute per se violations of the antitrust laws of the United States.)

The central questions presented by the United States Court of Appeals seems to be entirely technical in nature and not supportable by the citations of authority relied upon by that Court in its decision.

Additionally, and equally important, is the problem that a class certification might not be possible in cases of this type since each member-unit owner, may well be required to separately show coercion on an individual basis for acceptance of the tied product or liabilities in view of the 5th Circuit opinion.

Thus, the implication in the decision of the United States Court of Appeals, that a class action might be permissible, may well be erroneous. *Unger vs. Dunkin' Donuts of America, Inc., et al., vs. Dunkin Donuts, Inc.,* 3 Cir. 1976, 531 F. 2d 1211, holding that *each* individual of a proposed class must prove coercion and, accordingly the certification of a class with respect to antitrust tying claims could not be approved.

If indeed this is the state of the law, then Petitioner *and* its membership may well be without any remedy whatsoever for redress of per se violations of the antitrust laws of the United States which have damaged petitioner and its membership both through contract and by combination, scheme, agreement, etc.

CONCLUSION

For the foregoing reasons, showing of conflict among the circuits and in view of the importance and wide application of the questions presented to this Court, it is respectfully prayed that the Petition for a Writ of Certiorari be granted.

Respectfully submitted:

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CERTIFICATION

IT IS HEREBY CERTIFIED that a true copy of the foregoing was mailed this 21st day of October, 1976 to Darrey A. Davis, Esq., Steel Hector & Davis, 1400 S. E. 1st National Bank Bldg., Miami, Florida.

By:
Joseph S. Paglino, Esq.

Printed copies mailed this
day of November, 1976.

APPENDIX

Appendix 1 - Fla. Stat. 711.12

Appendix 2 - Fla. Stat. 711.121

Appendix 3 - Notice of Filing Annexation to Complaint

Appendix 4 - Motion to Dismiss

Appendix 5 - Response to Motion to Dismiss

Appendix 6 - Motion for Evidentiary Hearing

Appendix 7 - Order Denying Plaintiff's Motion for Evidentiary Hearing on Jurisdictional Issue

Appendix 8 - Order of Dismissal

Appendix 9 - Opinion in Buckley Towers Condominium, Inc. etc., vs Herbert Buchwald, etc.

Appendix 10 - Complaint

Appendix 11 - Denial of Petition for Rehearing

(c) Such other provisions not inconsistent with this law or with the declaration as may be desired.

History and Source of Law

Derivation:
Laws 1963, c. 63-35, § 11.

Library References

Associations ⇐5. C.J.S. Associations § 11.

711.12 The association

(1) The operation of the condominium shall be by the association, the name of which shall be stated in the declaration. The declaration may require the association to be organized as a particular entity, such as but not limited to a corporation for profit or corporation not for profit, in which the owners of units shall be stockholders or members.

(2) The association, whether or not incorporated, shall be an entity which shall act through its officers and shall have the capability of contracting, bringing suit and being sued. If not incorporated the association shall be deemed to be an entity existing pursuant to this act and shall have power to execute contracts, deeds, mortgages, leases and other instruments by its officers. Service of process upon the association if not incorporated may be had by serving any officer of the association or by serving the agent designated for service of process. Service of process upon the association shall not constitute service of process upon any unit owner.

(3) No unit owner, except as an officer of the association, shall have any authority to act for the association.

(4) Unless limited by the declaration the powers and duties of the association shall include those set forth in this law. The powers and duties of the association shall include also those set forth in the declaration and bylaws.

(5) The association shall have the irrevocable right to have access to each unit from time to time during reasonable hours as may be necessary for the maintenance, repair or replacement of any common elements therein or accessible therefrom, or for making emergency repairs therein necessary to prevent damage to the common elements or to another unit or units.

(6) The association shall have the power to make and collect assessments, and to lease, maintain, repair and replace the common elements.

(7) The association shall maintain accounting records according to good accounting practices which shall be open to inspection by unit owners at reasonable times. Such records shall include:

(a) A record of all receipts and expenditures.

(b) An account for each unit which shall designate the name and address of the unit owner, the amount of each assessment, the dates and amounts in which the assessment come due, the amounts paid upon the account and the balance due.

(8) The association, whether or not incorporated, shall have the power unless prohibited by the declaration of condominium, articles of incorporation, or bylaws of the association, to purchase units in the condominium and to acquire and hold, lease, mortgage and convey the same.

History and Source of Law

Derivation:
Laws 1965, c. 65-337, §§ 4, 5.
Laws 1963, c. 63-35, § 12.

The 1965 amendment deleted a reference giving the association power to execute contracts, deeds, mortgages, leases and other instruments appearing in the original act. The 1965 amendment also added subsection (8).

Library References

Associations ⇐1, 13 et seq. C.J.S. Associations §§ 1, 12 et seq., 29.

Notes of Decisions

In general 1
Cancellation or modification of leases 3
Mismanagement 2

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1. In general

Although promoters of condominiums caused associations operating them to be organized as corporations not for profit, promoters were entitled to have rules applicable to private corporations for profit applied to their activities, inasmuch as Condominium Act permits association that operates such a project to function as, but not limited to, a corporation for profit or corporation not for profit. Fountainview Ass'n, Inc., No. 4 v. Bell, App., 203 So.2d 657 (1967).

2. Mismanagement

Complaints in which non-profit associations incorporated under Condominium Act alleged that individual defendants after organizing associations and becoming sole officers, directors, and members of associations conveyed or leased land to associations on inflated terms and caused associations to enter into management contracts with third party at exorbitant fees did not state cause of action for recovery from defendants of any unconscionable profit made on sale or lease of land and construction of improvements thereon or for relief from excessive fees on management contracts, since defendants were sole members of association. Fountainview Ass'n, Inc., No. 4 v. Bell, App., 203 So.2d 657 (1967).

3. Cancellation or modification of leases

Evidence, in purported class action to cancel or modify leases on communal recreational facilities, sus-

BEST COPY AVAILABLE

tained findings that parking spaces for condominiums were adequate, that defendant promoters had not contracted to furnish lawn sprinkler system, that defendants had not contracted to erect fence along walkway that was alternate route around premises and that no impropriety in handling insurance claim had been established. Wechsler v. Goldman, App., 214 So.2d 741 (1968).

Although 99-year lease for use of communal recreational area imposed on condominium association exorbitant rental and returned excessive profit to promoters, purchasers of condominium apartment units who acquired knowledge of lease, and became guarantors thereof, at time of closing were not entitled to cancellation or modification of leases. Id.

Although rental obligation imposed on condominium associations while both lessee and lessor were owned or controlled by promoters was assertedly exorbitant, the associations were not entitled to have the rental revised to a realistic and reasonable amount. Id.

711.121 Associations to acquire and enter into agreements

In addition to any other provisions of this chapter, an association may acquire and enter into agreements whereby it acquires leaseholds, memberships and other possessory or use interests in lands or facilities including but not limited to country clubs, golf courses, marinas and other recreational facilities, whether or not contiguous to the lands of the condominium, intended to provide for the enjoyment, recreation or other use or benefit of the unit owners. All of such leaseholds, memberships and other possessory or use interests existing or brought into existence at the time of recording the declaration shall be set forth and fully described therein. Subsequent to the recording of the declaration, the association may not acquire or enter into agreements acquiring such leaseholds, memberships or other possessory or use interests except as authorized by the declaration and bylaws. The declaration and bylaws may declare the expenses of rental, membership fees, operations, replacements and other undertakings in connection therewith to be common expenses and may include covenants and restrictions concerning the use of the same by the unit owners and such other provisions not inconsistent with this law as may be desired.

History and Source of Law

Derivation:
Laws 1965, c. 65-9, § 1.

Library References

Associations ⇐10. C.J.S. Associations § 12 et seq.

711.13 Maintenance; limitation upon improvement

(1) The maintenance of the common elements shall be the responsibility of the association.

APPENDIX 3
25

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION JLK FWP

CASE NO: 75-38 Civ NCR

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida Condominium corporation, on behalf of itself and its stockholders and members,

Plaintiff,

-vs-

HERBERT BUCHWALD, Individually and as Trustee, and Buckley Development Company, Ltd.,

Defendants.

NOTICE OF FILING ANNEXATION TO COMPLAINT

FILED BY dc
FEB 19 12 00 P
JOSEPH L. BOGART
CLERK U.S. DIST. CT.
S.D. OF FLA MIAMI

Plaintiff, through counsel, gives notice of the filing of CONDOMINIUM DOCUMENTS of BUCKLEY TOWERS CONDOMINIUM, 1399 Miami Gardens Drive, Miami, Florida, as Exhibit A to the Complaint in this cause, copies of said Exhibit A having been annexed to and made a part of the copies of Complaint served upon the defendants in the cause.

Law Offices of Joseph S. Paglino
Counsel for Plaintiff
88 N.E. 79th Street
Miami, Florida 33138 (Tel. 758-8017)

By Joseph S. Paglino
Joseph S. Paglino, Esq.

APPENDIX 4
26

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION CASE NO. 75-38-Civ. - JLK

Filed: April 15, 1975

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida Condominium corporation, etc.,

Plaintiff

vs.

HERBERT BUCHWALD, et al.,

Defendants

MOTION TO DISMISS

The defendants, HERBERT BUCHWALD, individually and as Trustee, and BUCKLEY DEVELOPMENT LTD., move the Court as follows:

1. To dismiss the action on the ground that the Court lacks jurisdiction because the averments of the complaint are insufficient to show that the alleged restraint of trade or commerce affects interstate commerce.

2. To dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted.

3. To dismiss the action because it affirmatively appears on the face of the complaint and attachments that this action was not commenced within four years after the alleged cause

of action accrued and is therefore barred by the statute of limitations (15 U.S.C., Sec. 15b).

4. To dismiss the action because the complaint and attachments affirmatively show that no illegal tying arrangement is involved, in that the sale of condominium apartment units subject to a lease providing recreation facilities for the condominium unit owners clearly constitutes a single product, and not two separate products.

5. To dismiss the action because the plaintiff lacks standing to sue under 15 U.S.C. Sec. 15 as a person injured in its business or property, in that, plaintiff is not shown to have purchased or acquired a condominium apartment unit (tying product) under the alleged illegal tying arrangement or paid any of its own funds as rents on the recreation lease (tied product).

6. To dismiss the class action purportedly brought on behalf of the members of the plaintiff condominium association, as purchasers of the condominium apartment units and victims of the alleged tying arrangement, because the complaint wholly fails to allege any ultimate facts sufficient to form the basis for a class action.

7. To dismiss the pendent jurisdiction claim alleged in Count Two of the complaint for failure to state a claim upon which injunctive relief can be granted, in that plaintiff's prayer for the stay of the proceedings pending in the state court is prohibited by the applicable provisions of 28 U.S.C. Sec. 2283.

STEEL HECTOR & DAVIS
1400 First National Bank Building
Miami, Florida 33131
Attorneys for Defendants
By: s/ Darrey A. Davis
DARREY A. DAVIS
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Dismiss has been furnished to Joseph S. Paglino, Esquire, 88 N.E. 79th Street, Miami, Florida 33138, Attorney for Plaintiff, by mail, this 15 day of April, 1975.

s/ Darrey A. Davis
DARREY A. DAVIS

APPENDIX 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 75-38-Civ-JLK
(Filed: April 22, 1975)

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida Condominium Corporation, on behalf of itself and its stockholders/members,

Plaintiffs,

vs.

HERBERT BUCHWALD, Individually and as Trustee, and Buckley Development, Ltd.,

Defendants

RESPONSE TO MOTION TO DISMISS

Plaintiffs, through counsel, make the following response to the Motions thus far filed in this cause by defendants and say:

1. The averments to the complaint are sufficient to state a claim upon which relief can be granted, since the plaintiffs have standing to bring the action and have stated a claim cognizable under the Anti-trust laws of the United States. Upon factual proceedings, it will be shown that the plaintiff Condominium Association is a party to the illegal contract complained of and is obligated to make payment under the contract. In a similar case now pending in this District, the Court faced this argument and found that a Condominium Association does have standing to sue under the Anti-Trust

laws (Commodore Plaza at Century 21 Condominium Association, Inc., et al vs. Saul J. Morgan Enterprises, Inc., et al: Case No. 74-570-Civ-JE) and, due to the unique attributes of a Condominium Association, which exists only because of its members, can maintain the action on behalf of the membership/shareholders also. In any event, the allegations are sufficient to show standing by plaintiffs and a not insubstantial affect upon commerce. Any attack on jurisdiction based upon the degree of interstate commerce affected should be left to a trial of the merits and presentation of factual matters or evidence in support of or against the amount of commerce affected.

2. In reply to the argument that the complaint fails to state any claim under any theory of Anti-Trust law, it is submitted that under prevailing law, all that need be alleged is a per se violation of the Sherman Act which damages the plaintiff(s) personally and this has been alleged in the instant case.

3. In reply to the affirmative defense of defendants, that the Statute of Limitations has run, it is submitted that this defense is not properly raised by motion, but should be raised as an affirmative defense by answer and, in any event, if the violations are continuing in nature, as in the instant case, 15 U.S.C.A. 15(b) is not in point and an action will lie. In addition, in the event the affirmative defense of Statute of Limitations is raised by answer, it will be affirmatively shown that the defendants controlled the affairs of the plaintiff for a period of time and retained management of plaintiff's affairs so as to prevent the action being brought and thereby tolling the statute, since it would be unrealistic to expect defendants to have instituted suit against themselves.

4. In reply to the argument that the sale of a condominium and the tying of the sale to a recreation lease contract is merely the sale of a single product, it will be affirmatively shown at trial that the condominium sale in the instant case was made by one entity and the recreation lease is owned by different entities, have different legal descriptions and involved different contractual and legal obligations, so as to make them separate and divisible, although tied in violation of the Anti-Trust laws. Further, all that is necessary is to allege the per se (tying arrangement) so as to state a claim under the act. Any affirmative defense should properly be stated in a responsive pleading to the complaint.

5. In reply to the additional attack upon standing raised by defendants, as to the non-profit corporate plaintiff, it is submitted that the plaintiff has alleged that it is a damaged party and pays monies under the illegal contract, until disproven, this allegation must stand as true for the purposes of a Motion to Dismiss. In any event, the lease contract affirmatively shows that the non-profit corporate plaintiff is a party and is charged with paying rentals, where the monies are obtained for such payment is not an issue in this case and, at trial, it can be affirmatively shown that monies flow to the non-profit corporate plaintiff from various sources, although this is not in point either. In the event the motion to dismiss intimates that, in the event monies are not collected from individual members of the condominium the gross rental will abate, it is submitted that the contracts annexed to and made a part of the complaint belie this assertion.

6. In response to the attack on the complaint as being one in the nature of a class action, it is submitted that all that is needed to state a claim under the Sherman Anti-trust Act is to allege a per se violation by a party damaged, it is not nec-

essary to state a class action when a party sues on behalf of itself and its membership/stockholders and it has the authority to so represent its membership and stockholders.

7. As to the attack upon the pendent jurisdiction of this Court, it is submitted that, if in fact the complaint states a claim, then the Court can make a determination as to the similarity in facts, documents, etc, so as to determine whether or not pendent jurisdiction exists and whether or not the Court can grant the relief requested in any claim under pendent jurisdiction, but any attack upon the pendent jurisdiction of the Court at this juncture of the proceedings is premature.

In general, under most recent cases, there is no spatial requirement for jurisdiction to be asserted under the Antitrust acts, since restriction of *any part* of commerce is sufficient to bring the Act into play and hence the jurisdiction of the Court. In addition, if any (not-insubstantial) amount of commerce is affected, this is sufficient to give this Court jurisdiction to hear the case. However, as in most cases of this type, the amount of commerce affected or restricted can not be determined until factual matters are presented and tested by Answer discovery, etc, and any decision as to the merits should be withheld until trial of the cause. In fact, it is proper for a court to deny a Motion to Dismiss and in fact preferrable that it do so, if the Motion raises matters which involve factual determination, a resolution of which will not only affect jurisdiction, but also the very merits of the case.

For the foregoing reasons and for the reasons set forth in Plaintiffs Memorandum of Law filed herewith, it is respectfully requested that the Motion to Dismiss be denied, or in the alternative, that decision be reserved by the Court until the trial of the cause on the merits and, in addition, in the

the Court wishes to dispose of the motion on the record to date, that the plaintiffs be permitted oral argument and an evidentiary hearing and the opportunity to engate in discovery so as to be able to properly present its factual and evidentiary matters.

Respectfully submitted:

Law Offices of Jos. S. Paglino
Counsel for Plaintiffs
88 N.E. 79th Street
Miami, Florida 33138
(Tel. 758-8017)

By: s/ Joseph S. Paglino
Joseph S. Paglino, Esq.

CERTIFICATION

IT IS HEREBY CERTIFIED that a true copy of the foregoing Response to Motion to Dismiss was mailed this 21 day of April, 1975 to Darrey A. Davis Esq., Steel, Hector & Davis, Counsel for Defendants, 1400 First National Bank Bldg., Miami, Florida 33131.

s/ Joseph S. Paglino
Joseph S. Paglino, Esq.
Counsel for Plaintiffs

APPENDIX 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 75-38-Civ-JLK
Filed: April 28, 1975

BUCKLEY TOWERS CONDOMINIUM, INC.,
a non-profit Florida Condominium Corporation, on behalf of itself and its stockholders/members,
Plaintiffs

vs.

HERBERT BUCHWALD, Individually and as Trustee, and Buckley Development, Ltd.,
Defendants

MOTION FOR EVIDENTIARY HEARING

Plaintiffs, through counsel, move this Honorable Court for an Evidentiary Hearing as to jurisdiction of the United States District Court to hear this cause and for oral argument as to jurisdiction and would show this Court that the jurisdictional questions presented in this cause are intertwined inextricably with the merits of the cause so as to involve factual matters which should properly be resolved only at a trial of the merits of the cause, however, in the event the Court wishes to resolve the jurisdictional question prior to the trial of the cause, it is respectfully requested that evidentiary hearings and oral arguments be permitted in the cause.

WHEREFORE, Counsel for Plaintiffs moves, that in the event the jurisdictional issue is not reserved for decision at

the trial of this cause, that Evidentiary hearings and oral arguments be allowed on the Defendant's Motion to Dismiss for lack of jurisdiction and for failure to state a claim.

Respectfully submitted:

Law Offices of Joseph S. Paglino
Counsel for Plaintiffs
88 N.E. 79th Street
Miami, Florida 33138
(Tel. 758-8017)

By: s/ Joseph S. Paglino
Joseph S. Paglino, Esq.

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION CASE NO. 75-38-Civ.-JLK
Filed: May 8, 1975

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida Condominium corporation, etc.,

Plaintiff

vs.

HERBERT BUCHWALD, et al.,

Defendants

ORDER DENYING PLAINTIFF'S MOTION FOR EVIDENTIARY HEARING ON JURISDICTIONAL ISSUE

Upon consideration of the motion of the plaintiff for an evidentiary hearing on the question of jurisdiction presented in this action, it is

ORDERED AND ADJUDGED that said motion for evidentiary hearing is denied.

DONE AND ORDERED at Miami, Florida, this 8 day of May, 1975.

s/ James Lawrence King
UNITED STATES DISTRICT JUDGE

APPENDIX 8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 75-38-Civ.- JLK
Filed: July 31, 1975

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida condominium corporation, etc.

Plaintiff,

vs.

HERBERT BUCHWALD, et al.,

Defendants

ORDER OF DISMISSAL

This cause came on for consideration upon the defendants' motion to dismiss the complaint for lack of subject matter jurisdiction, and for failure to state a claim upon which relief can be granted. The court, having considered the record and being fully advised in the premeses, finds and concludes that the above-styled action should be dismissed for failure to state a claim upon which relief can be granted.

On behalf of itself and its stockholders and members,* the Buckley Towers Condominium, Inc., a non-profit Florida

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* Although the Plaintiff purports to bring this action on behalf of its members and stockholder, the association has expressly disclaimed any intention to maintain the present action as a class action. Consequently, there is no need to determine whether the action meets the requirements of Fed. R. Civ. P. 23.

Condominium Corporation, brought this action against Herbert Buchwald and the Buckley Development Company, the developers of the Buckley Towers Condominium. The Plaintiff alleges that the developers entered into a scheme which constitutes an unlawful tie-in, a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. §1. The plaintiff seeks treble damages, declaratory relief, and an inunction against certain state court civil proceedings.

In their motion, the defendants suggest several grounds for dismissing the action. The disposition of the motion, however, rests on the issue of standing.

For the purpose of deciding the motion to dismiss, the facts as they appear from the complaint and the exhibit attached to the complaint are presumed true. On August 6, 1968, the plaintiff was incorporated under Fla. Stat. § 617 as a non-profit corporation, and a condominium association under Fla. Stat. §711.12. According to the plaintiff's articles of incorporation, the purpose of the corporation is "to provide an entity responsible for the operation of a condominium in Dade County, Florida known as 'Buckley Towers, a Condominium.'". Membership in the association is limited to "all of the record owners of the condominium parcels of the Condominium." The association is empowered

> To acquire and enter into agreements whereby it acquires leaseholds, memberships or other possessory or use interests in lands or facilities, whether or not contiguous to the lands of the Condominium, intended to provide for the enjoyment, recreation, or other use or benefit of the unit owners.

Sometime prior to December 18, 1968, the plaintiff condominium association entered into a long-term lease of recreational facilities from the defendant, Mr. Buchwald. The

facilities are situated on land which is not a part of, but is adjacent to, the Buckley Towers Condominium. According to a formula set forth in the lease, the plaintiff is obligated to pay the defendant rent in excess of $18,700.00 per month. The "Community Facility Lease" further provides:

> Each and every person, whether real or corporate, who shall take any interest whatsoever in or to the Condominium described in Exhibit C [Buckley Towers West and Buckley Towers East] attached hereto, any of the Condominium's properties, or in or to an condominium parcels in the Condominium after the recording of this lease, by acceptance, delivery or the recording of the deed, contract, grant, assignment or other instrument granting, conveying or providing for such interest, or by the mere first exercise of the rights or uses granted herein, shall be deemed to consent to and ratify without further act being required, the provisions of this lease and especially the provisions of the entire Paragraphs IX [granting security interest in all condominium property to Lessor] and X [granting Lessor right to assign and encumber Lessor's interest in lease and demised premises] to the same effect and extent as if such person or persons had executed this lease with the formalities required in deeds, for the purpose of subordinating and/or subjecting such person or persons' interests, in full, to the terms of this lease and granting the lien rights to Lessor provided for in this Paragraph X.

The terms of the Community Facility Lease also require the association

> "to assess its unit owners, excepting the recreation unit owner...in such amounts as shall be necessary

> to pay its obligations, payable in money to the Lessor hereunder, and to otherwise perform its covenants and promises herein.

On December 18, 1968, a copy of the recreation lease was filed in the Official Records of Dade County as an exhibit to the Declaration of Condominium of the Buckley Towers Condominium. To the extent here relevant, the declaration essentially incorporates, by reference the terms of the lease, and restates the provision relating to the condominium owner's ratification of the lease. Also, the declaration includes a provision which declares the rental fee a "common expense" for which the unit owners shall be assessed.

According to the plaintiff, the organization of the Buckley Towers Condominium is objectionable in that the purchaser of a condominium is required to accept and ratify the obligation to make rental payments on the Community Facility Lease. This arrangement, the plaintiff charges, constitutes an unlawful tie-in, a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. §1. Although the plaintiff must assess the unit owners for the funds paid on the lease, the association maintains that it is harmed by the obligation to pay unreasonable rent for the remaining 95 years of the 99-year lease.

Section 4 of the Clayton Act confers standing to bring a civil antitrust action for treble damages upon "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. §15. In construing Section 4, however, the courts have refused to confer standing upon every plaintiff whose injury is remotely traceable to an anti-trust violation, *Hawaii v. Standard Oil Company of California*, 405 U. S. 251, 262 (1972). As a result, the Courts of Appeal have devised various standards

for determining whether a party has standing. *Hawaii v. Standard Oil Company of California, supra* at 262 N. 14; *Battle v. Liberty National Life Insurance Company*, 493 F. 2d 39 (5th Cir. 1974); *In re Multidistrict Vehicle Air Pollution MDL No. 31*, 481 F. 2d 122 (8th Cir. 1973). The standards focus on the sufficiency of the causal relationship between the alleged violation and the harm to the plaintiff. *See, e.g., Battle v. Liberty National Life Insurance Co., supra. In re Multidistrict Vehicle Air Pollution MDL No. 31, supra.* The standard applied in the Fifth Circuit requires

> The plaintiff to show that he is "within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby."

Battle v. Liberty National Life Insurance Company, supra at 49, quoting *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F. 2d 414, 418 (4th Cir. 1966).

The difficulty with the present case is finding any connection at all between the harm to the plaintiff condominium association and the alleged tie-in. Throughout the complaint, the affidavit of the association president, and the plaintiff's memoranda, the plaintiff repeatedly stresses that the association is harmed by the obligation to pay allegedly unreasonable rent for 95 years. Since the Community Facility Lease, to which the plaintiff is a party, specifically provides for the amount and duration of the rental payments, the harm to the plaintiff flows directly from the association's liability on the lease. Thus for the plaintiff to have standing, the alleged tie-in must be the proximate cause of the plaintiff's liability on the lease.

However, the very structure of the alleged tie-in limits the circumstances in which a plaintiff, solely harmed by liability on the lease, is able to supply the requisite causal connection. The condominium association claims that the defendants have engaged in a practice of tying the obligation to make rental lease payments to the purchase of a condominium: the condominium unit is the tying product; and, the liability on the lease is the tied product. Given the structure of the tie-in, the causal connection between the alleged violation and the liability on the lease exists only where the plaintiff has purchased a condominium. Consequently, the plaintiff must be a purchaser.

A review of the complaint, and the affidavit of the association president, reveals not even the slightest suggestion that the association purchased a condominium unit to which the liability on the lease was tied. Instead, the facts alleged indicate that the plaintiff's obligations, under the Community Facility Lease, arose independent of the tie-in. The condominium association, shortly after it was incorporated, entered into a direct contractual relationship with the defendants for the lease of the recreational facilities. Under the circumstances of this case, the manner in which the plaintiff became obligated on the recreation lease is fatally inconsistent with the notion that the condominium association has standing to complain of the alleged tie-in. Therefore,it is

ORDERED and ADJUDGED that the above-styled action be and the same is hereby dismissed for failure to state a claim upon which relief can be granted.

DONE and ORDERED in chambers at Miami, Florida, this 31st day of July, 1975.

s/ James Lawrence King
JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

cc: Steel Hector and Davis
Joseph S. Paglino, Esq.

BUCKLEY TOWERS CONDOMINIUM, INC., a nonprofit Florida Condominium Corporation on behalf of itself and its stockholders and members, Plaintiffs-Appellants,

v.

Herbert BUCHWALD, Individually and as Trustee, et al., Defendants-Appellees.

No. 75-3463.

United States Court of Appeals, Fifth Circuit.

June 17, 1976.

A nonprofit condominium corporation brought an action against developers of the condominium, under first and second sections of the Sherman Act and under the treble damages section of the Clayton Act. A motion to dismiss the suit was granted by the United States District Court for the Southern District of Florida, at Miami, James Lawrence King, J., 399 F.Supp. 88, and leave to amend the complaint was denied. An appeal was taken by the condominium corporation. The Court of Appeals, Simpson, Circuit Judge, held that the alleged tying products were the residential condominium units and the tied product was recreational facilities and obligations to make rental payments thereon, and since the required causal connection of antitrust violations to injury could exist only with respect to purchasers of the condominium units, the condominium corporation had no standing to bring the action, even under the broader Clayton Act section providing for injunctive relief. In light of commencement of a second action alleging substantially the same claims brought by the condominium corporation and by an additional party on behalf of unit owners, the District Court did not abuse its discretion in denying the condominium corporation's motion to amend its complaint and add or join parties plaintiff.

Affirmed.

1. Monopolies ⇐28(1.6)

In action by nonprofit condominium corporation against condominium developers for alleged unlawful tie-in in violation of Sherman Act and for treble damages under Clayton Act, alleged tying products were residential condominium units and tied product was recreational facilities and obligation to make rental payments thereon, and condominium corporation had no standing to bring action under first or second sections of Sherman Anti-Trust Act or even under broader Clayton Act section providing for injunctive relief. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 4B, 16, 15 U.S.C.A. §§ 15, 15b, 26; Fed.Rules Civ.Proc. rule 59, 28 U.S.C.A.; West's F.S.A. §§ 617.01 et seq., 711.12, 711.121, 711.14.

2. Monopolies ⇐24(9)

Clayton Act section providing for injunctive relief is broader than treble damage section in that it does not require injury to "business or property" in order to achieve standing, but plaintiff under injunctive relief section must nevertheless demonstrate loss or injury cognizable in equity proximately resulting from the alleged antitrust violation. West's F.S.A. §§ 711.121, 711.14; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

3. Federal Civil Procedure ⇐392

In light of commencement of second action alleging substantially same claims brought by appellant and by an addition-

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al party on behalf of still other parties, district court did not abuse its discretion in denying appellant's motion to amend its complaint and add or join parties plaintiff.

Appeal from the United States District Court for the Southern District of Florida.

Before DYER and SIMPSON, Circuit Judges, and FAY, District Judge.

SIMPSON, Circuit Judge:

Appellant, Buckley Towers Condominium, Inc., (hereinafter appellant or Buckley) a non-profit Florida condominium association brought this action (designated in the district court as No. 75–38–CIV–JLK), on behalf of itself and its stockholders and members, against the developers of the Buckley Towers Condominium for alleged violations of Sections 1 and 2 of the Sherman Act, Title 15, U.S.C., Sections 1, 2. Count I of the complaint alleged an illegal tying arrangement by the defendants-appellees in that the purchasers of condominium units in Buckley Towers are required to accept and ratify the obligation to make rental payments to the appellees under a lease of recreation facilities provided for the use of the unit owners. The appellant sought treble damages pursuant to Section 4 of the Clayton Act, Title 15, U.S.C., Section 15, in the amount of all monies paid by the appellant or its members under the lease trebled. In addition, although the complaint did not invoke jurisdiction under Section 16 of the Clayton Act, Title 15, U.S.C., Section 26, the appellant sought (i) the cancellation and rescission of the lease, (ii) a permanent injunction restraining the appellees from enforcing the terms of the lease, and (iii) the award to the appellant of title to the real property covered by the lease. The second count of the complaint sought ancillary relief in the form of a stay by the district court of state court proceedings brought by appellee Buchwald to compel enforcement of a state court approved settlement agreement between the parties, see *Buckley Towers Condominium, Inc. v. Buchwald*, Fla., 3 D.C.A. 1975, 321 So.2d 628, and requested that the appellant be allowed to deposit the rental payments due under the lease into the registry of the court pending a final determination of the suit. The district court on July 31, 1975, granted the appellees' motion to dismiss the suit for failure to state a claim upon which relief could be granted on the ground that since the appellant never purchased a condominium unit in Buckley Towers, it lacked standing to bring the action under Section 4 of the Clayton Act. *Buckley Towers Condominium, Inc. v. Buchwald*, S.D.Fla.1975, 399 F.Supp. 38.

Subsequent to the entry of the order of dismissal the appellant on August 11, 1975, moved the district court for clarification of the order of dismissal, and for leave to amend the complaint and to add or join as parties plaintiff the residential condominium unit owners. Further, on August 25, 1975, twenty-five days after the entry of the order of dismissal, the appellant filed in the court below a motion for reconsideration of the July 31, 1975 order of dismissal. The district court on August 27, 1975, granted the appellant's motion for clarification, and held that the order of dismissal was with prejudice. By the same order the district court denied the appellant's motion for leave to amend the complaint, holding that such motion was rendered moot by reason of the filing on August 6, 1975, of a substantially similar action, designated in the district court as No. 75–1549–CIV–JLK, by the appellant and by the owner of a residential condominium unit in Buckley Towers "individually and on behalf of all residential unit owners at the Buckley Towers Condominium".[1]

On September 8, 1975, the district court denied the appellant's motion for reconsideration of the order of dismissal of No. 75–38–CIV–JLK because the notice of appeal therefrom filed September 2, 1975, divested it of jurisdiction to reconsider. Appellant filed in this court a motion to remand the cause to the district court for the limited purpose of permitting a reconsideration of the order of dismissal. A panel of this court granted the limited remand by an order of November 17, 1975. On remand the district court held that it lacked authority to reconsider since appellant's motion for reconsideration was not filed or served within the ten-day period prescribed by F.R.Civ.P., Rule 59. See *Martin v. Wainwright*, 5 Cir. 1973, 469 F.2d 1072, 1073, cert. denied 411 U.S. 909, 93 S.Ct. 1538, 36 L.Ed.2d 199; *Albers v. Gant*, 5 Cir. 1970, 435 F.2d 146, 147.

The appeal before us is from the order below dismissing the action for failure to state a claim upon which relief could be granted. We affirm.

The complaint and the condominium documents appended thereto show that the appellant was incorporated August 6, 1968, as a non-profit corporation under Fla.Stat. Chapter 617, and a condominium association under Fla.Stat. Section 711.12. Pursuant to its articles of incorporation the condominium association has the responsibility for the operation and maintenance of the condominium, excluding the privately owned units, and is empowered "to acquire and enter into agreements whereby it acquires leaseholds, memberships, or other possessory or use interests in lands or facilities, whether or not contiguous to the lands of the Condominium, intended to provide for the enjoyment, recreation, or other use or benefit of the unit owners." The members of the appellant association consist solely of present record owners of units in Buckley Towers.

Buckley Towers Condominium, Inc. came into existence on December 17, 1968, with the recordation of the Declaration of Condominium in the public records of Dade County, Florida. The condominium project consists of two seventeen story buildings containing 564 residential apartment units, 5 shop units, and 23 recreation units. Simultaneously with the execution of the Declaration of Condominium Buckley leased for a period of 99 years from appellee Buchwald the property and facilities consisting of the 28 recreation units. The recreation units covered by the "Community Facility Lease" are located on land adjacent to the Buckley Towers Condominium, and leased for a total yearly rental payable in 12 monthly installments of over $18,700.00 each.

The Declaration of Condominium and the Community Facility Lease provide in part:

1. A copy of the complaint in No. 75–1549 appears in this record as an exhibit to the defendant's Memorandum in Opposition to Plaintiff's Motion (filed August 11, 1975) for Clarification of Order of Dismissal, Etc. We were informed by counsel at oral argument that No. 75–1549 was dismissed by Judge King as barred by the four year Statute of Limitations of the Clayton Act, Title 15, U.S.C. § 15b, and that an appeal from that dismissal is now pending before this court. We note from our own records the existence of such an appeal: No. 76–1848 styled Ignatz Spitz, etc., et al., Plaintiffs-Appellants, v. Herbert Buchwald, etc., et al., Defendants-Appellees.

"Each apartment and shop unit owner, his heirs, successors and assigns is bound by said community facility lease to the same extent and effect as if he had executed said lease for the purpose therein expressed, including but not limited to (a) subjecting all his right, title and interest in his apartment or shop unit, the condominium property and the Association to the lien rights granted the Lessor in Paragraph IX of said lease; (b) adopting, ratifying, confirming and consenting to the execution of the lease by the Association, as lessee; (c) covenanting and promising to perform each and every of the covenants, promises and undertakings to be performed by apartment or shop unit owners in the cases provided therefor in said lease; (d) ratifying, confirming and approving each and every provision of said lease and acknowledging that all of the terms and provisions thereof, including rental reserved, are reasonable; and (e) agreeing that the persons acting as directors and officers of the Association in the acquisition of such leasehold have not breached any of their duties or obligations to the Association. . . . The expense of rental, replacements, and other undertakings as set forth in the community facility lease are hereby declared to be common expenses. Each apartment owner shall have the right to use, occupy and enjoy the community facilities through the Association, as lessee, subject to all of the provisions of said community facility lease."

The lease further provides pursuant to Fla.Stat. Sections 711.121 and 711.14 [2] as follows:

"XIV. *DUTY OF LESSEE TO ASSESS AND PAY.* It shall be the duty of the Lessee to assess its unit owners, excepting the recreation unit owner, in accordance with the Florida Condominium Act, its Declaration of Condominium and By-Laws in such amounts as shall be necessary to pay its obligations, payble in money to the Lessor hereunder, and to otherwise perform its convenants and promises herein."

Upon recordation of the Declaration of Condominium and a copy of the Community Facility Lease as an exhibit thereto, appellee, Buckley Development Company, Ltd., became the owner of all units

2. Fla.Stat. Section 711.121 provides in pertinent part:

"In addition to any other provisions of this chapter, an association may acquire and enter into agreements whereby it acquires leaseholds, memberships and other possessory or use interests in lands or facilities including but not limited to country clubs, golf courses, marinas and other recreational facilities, whether or not contiguous to the lands of the condominium, intended to provide for the enjoyment, recreation or other use or benefit of the unit owners. . . . The declaration and bylaws may declare the expenses of rental, membership fees, operations, replacements and other undertakings in connection therewith to be common expenses and may include covenants and restrictions concerning the use of the same by the unit owners and such other provisions not inconsistent with this law as may be desired."

Fla.Stat. Section 711.14 as amended in 1975 provides in pertinent part:

"(1) Common expenses shall include the expenses of the operation, maintenance, repair, or replacement of the common elements, costs of carrying out the powers and duties of the association and any other expense designated as common expense by this law, the declaration or the bylaws.

(2) In a residential condominium, funds for the payment of common expenses shall be assessed against unit owners in the proportions or percentages of ownership of the common elements provided in the declaration."

in the condominium project. By April 8, 1971, all of the residential condominium units had been sold by the appellee-developer to individual purchasers. Certain of these units have been subsequently resold by the original purchasers. The appellant condominium association, however, has never purchased a condominium unit from either the appellee-developer or from an intermediate purchaser.

The gravamen of the appellant's claim is that the Declaration of Condominium and the Community Facility Lease create a tying arrangement in violation of Section 1 of the Sherman Act, in that the purchaser of a condominium unit in Buckley Towers is required to accept and ratify the terms of the recreation lease and the obligation to make rental payments to the appellees thereunder. The appellant asserts that although it is required by the terms of the Declaration of Condominium and the Community Facility Lease to assess the condominium unit owners, which constitute its membership, for the funds to pay the rental for the recreation facilities covered by the lease, it nonetheless has standing to maintain this action as lessee of the facilities, and because it is nominally liable for the payment of the rental on the leasehold under the terms of the lease.

We held in *Battle v. Liberty National Life Insurance Company*, 5 Cir. 1974, 493 F.2d 39, cert. denied 1975, 419 U.S. 1110, 95 S.Ct. 784, 42 L.Ed.2d 807, that in order to have standing to maintain an action for treble damages under Section 4 of the Clayton Act a plaintiff must satisfy two criteria: (1) the plaintiff must demonstrate an injury to its "business or property", and (2) the plaintiff must show that this injury was the result of the defendant's illegal activities. *Id.* at 49. See also *Hawaii v. Standard Oil Company of California*, 1972, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184; *Dailey v. Quality School Plan, Inc.*, 5 Cir. 1967, 380 F.2d 484; *Martin v. Phillips Petroleum Company*, 5 Cir. 1966, 365 F.2d 629, cert. denied 385 U.S. 991, 87 S.Ct. 600, 17 L.Ed.2d 451.

[1, 2] The application of these two standards to the facts here demonstrates that the district court correctly decided that the appellant lacked standing to maintain this action. Buckley has not alleged or shown as required by the second of the above criteria that the claimed antitrust violations caused injury to it in its business or property.

The district court correctly noted that the tied product is the recreational facilities and the obligation to make rental payments on those facilities, and the tying products are the residential condominium units in Buckley Towers. *Buckley Towers Condominium, Inc. v. Buchwald*, supra, 399 F.Supp. at 40. Thus, the required causal connection of antitrust violation to injury could exist only with respect to purchasers of the condominium units. Buckley's liability for the rental payments under the lease arose not as the result of its purchase of a condominium unit, but rather as a result of its direct contractual relationship with the appellees as lessee of the recreation units. The appellant has failed to show as required by the first criterion any injury to its "business or property", defined by the Supreme Court as "commercial interests or enterprises", *Hawaii v. Standard Oil Company of California*, supra, 405 U.S. at 264, 92 S.Ct. at 892, 31 L.Ed.2d at 193–94, from the claimed antitrust law violations.

Pursuant to the terms of the Declaration of Condominium and the Community Facility Lease, and as required by Florida Statute Sections 711.121 and

711.14, (see note 2 supra) the rental payments on the lease are common expenses which are paid by the association through assessments upon the condominium unit owners. Buckley acts solely as a conduit in collecting the assessments from the unit owners and paying the rental to the appellees. The association thus is not injured in its commercial interests or enterprises as a result of the alleged unlawful tying arrangement. Indeed, in the strict sense it has no *commercial* interests or enterprises.

Similarly lacking in merit is the appellant's fall-back assertion that it had standing to maintain on behalf of itself and its members an action for injunctive relief under Section 16 of the Clayton Act. Title 15, U.S.C., Section 26. Although Section 16 is broader than Section 4 in that it does not require an injury to "business or property", in order to achieve standing under Section 16 a plaintiff must demonstrate a loss or injury cognizable in equity proximately resulting from the alleged antitrust violation. See *Hawaii v. Standard Oil Company of California*, supra, 405 U.S. at 260–62, 92 S.Ct. at 890, 31 L.Ed.2d at 191–92; *Zenith Radio Corp. v. Hazeltine Research*, 1969, 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129, 152; *Jeffrey v. Southwestern Bell*, 5 Cir. 1975, 518 F.2d 1129, 1132; *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 5 Cir. 1973, 476 F.2d 989. Leaving aside the alleged damage to the residential condominium unit owners the appellant-association has not alleged and we do not apprehend any damage cognizable in law or equity sufficient to confer standing to sue upon Buckley even under the eased requirements of Section 16.[3]

[3] Finally, we hold that the district court did not abuse its discretion in denying the appellant's motion to amend its complaint and add or join parties plaintiff, in light of the commencement of a second action alleging substantially the same claims brought by the appellant and by an individual condominium unit owner on behalf of all residential unit owners at the Buckley Towers Condominium. *Ignatz Spitz, etc., et al. v. Herbert Buchwald, etc., et al.*, S.D.Fla., 75–1549–CIV–JLK. *Cf. Miller v. Granados*, 5 Cir. 1976, 529 F.2d 393.

AFFIRMED.

3. The decision of the Supreme Court as to the standing of certain organizations and associations to attack zoning ordinances and other actions of town boards, in *Warth v. Seldin*, 1975, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343, is inapposite here. The Court in *Warth* held that an association may have standing as the representative of its members even in the absence of injury to itself, but the association must allege that its members are suffering or threatened with injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves been parties to the suit. *Id.* 422 U.S. at 509–13, 95 S.Ct. at 2211–12, 45 L.Ed.2d at 361–62. This holding was limited, moreover, by the statement that the association must show that "the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause . . . ." *Id.*

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3403

D. C. Docket No. CA 75-38 JLK

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit, Florida Condominium Corporation on behalf of itself and its stockholders and members,
Plaintiffs-Appellants,

versus

HERBERT BUCHWALD, Individually and as Trustee, ET AL.,
Defendants-Appellees

Appeal from the United States District Court for the Southern District of Florida

Before DYER and SIMPSON, Circuit Judges, and FAY, District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

June 17, 1976

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

EDWARD W. WADSWORTH
Clerk

Office of the Clerk
September 21, 1976
Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL COUNSEL OF RECORD

NO. 75-3403 - Buckley Towers Condominium, Inc., etc. vs. Herbert Buchwald, etc., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By: s/ Clare F. Sachs
Deputy Clerk

cc: Mr. Joseph S. Paglino
Mr. Darrey A. Daivs

APPENDIX 10

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO: 75-38
Filed: January 10, 1975

BUCKLEY TOWERS CONDOMINIUM, INC.,
a non-profit Florida Condominium corporation,
on behalf of itself and its stockholders and
members,

Plaintiff

vs.

HERBERT BUCHWALD, Individually and as
Trustee, and Buckley Development Company,
Ltd.,

Defendants

COUNT I

The Plaintiff, Buckley Towers Condominium, Inc., on behalf of itself and its stockholders and membership, hereinafter called Condominium Association, sues the Defendants, Herbert Buchwald, individually and as trustee, and Buckley Development Company, Ltd., a limited partnership, and says:

1. Jurisdiction is founded on the existance of a Federal question arising under 15 U.S.C. 1 and 2.

2. The Plaintiff, a Condominium Association, engaged in interstate activities, brings this action on behalf of itself and its members and shareholders pursuant to the provisions of 15 U.S.C. 15 and 28 U.S.C.A. 2201, and alleges that the Plaintiff is an entity which is injured in its business or property by reason of Defendants violations of 15 U.S.C. 1 and 15 U.S.C. 2 and that the offense is a continuing one which occurs both directly in commerce and, in addition, that the intrastate activities of Plaintiff involved herein have a not insubstantial effect upon commerce.

3. That on or about December 18, 1968, the Defendants herein, caused to be recorded in the Official Records of Dade County, Florida, at Official Records Books 210, page 443, a lease agreement, as part of a combination in restraint of trade and scheme for the purpose of obtaining monies illegally and improperly from the intended membership and shareholders of Plaintiff corporation and from Plaintiff corporation, as hereinafter alledged, which leasehold substantially affects and restrains the interstate and intrastate business of Plaintiff and others.

4. That, on or about December 18, 1968, the Defendants herein, caused to be recorded a certain instrument known as a Declaration of Condominium for Buckley Towers Condominium,said instrument being recorded among the public records of Dade County, Florida, at Clerk's File #68R-205396 and, one of the reasons for causing the preparation and recordation of this document was to aid and abet in the execution of the combination and scheme to violate 15 U.S.C. 1 and 2 as stated hereinabove and create a controlled marketing area and monopoly insofar as the sale of Condominium Units and recreational facilities at Buckley Towers Condominium was concerned.

5. That, by virtue of the above noted documents and the scheme developed by Defendants herein, it was sought to restrain and restrict the said Condominium purchasers as shareholders and members of Plaintiff and to also restrict Plaintiff, to the use of and compel the lease of a recreation area owned by the Defendant herein, Herbert Buchwald, trustee and certain other diverse associates of Herbert Buchwald, trustee, as beneficiaries of said trust, said area being adjacent to the Buckley Towers Condominium Complex and originally a part of one common piece of property which was later partitioned and upon which were constructed the Condominium Complex improvements and the leased recreational area.

6. That the scheme used to violate the provisions of 15 U.S.C. 1 and 15 U.S.C. 2, was to cause Plaintiff herein and the membership of Plaintiff herein as Condominium unit purchasers at the aforesaid Condominium to be bound for payment of the rental on the aforesaid 99 year leasehold contract for the full term of said lease, a period in excess of 95 years.

7. That, the defendants herein, arbitrarily, and without resort to any commonly accepted standards of valuation, set an exorbitantly high monthly rental on the aforesaid recreation lease area, to wit: a sum in excess of $12,900.00 per month, to be additionally increased from time to time by the Cost of Living Index for the entire 99 year term, without providing any additional benefits or consideration. Notice of the first such increase having been given for an increase as of January 1, 1975, so as to increase the monthly rentals to the sum of $18,777.00 an increase in excess of 44% from the original rental.

8. That the dwelling units at the Condominium were

offered for sale to prospective purchasers from among the several states throughout the United States of America, and, as a condition precedent to and an absolute requirement of all purchasers of Condominium units at Buckley Towers Condominium, the Defendants, required that each unit purchaser, adhere to, guarantee, ratify and accept and agree to be bound to the terms of the aforesaid 99 year leasehold and that sales from the said tying arrangement exceeded 10 million dollars.

9. That it was well known, or should have been well known, to the Defendants and persons or entities controlled by the Defendants, including the then directors and officers of Plaintiff Condominium Corporation, who at that time were different from the present officers and directors and were persons controlled by or who acted at the direction of Defendants herein, that the foregoing scheme was an illegal tying and pricing arrangement, which was practiced upon unit purchasers, in order to discourage or restrain them from seeking membership in, or joining other recreational oriented facilities, or preventing Plaintiff from providing its own recreational facilities upon Condominium property, by the device of discouraging same, by causing the aforesaid unit purchasers and members of plaintiff to pay monies as an absolute requirement for the use of the aforesaid recreational leased area, although there was no valid business purpose for same, during their ownership of and residence at the Buckley Towers Condominium Complex, whether or not the member of Plaintiff actually used the recreation facilities or not and by artificially partitioning the property as aforesaid.

10. That, in addition thereto, it was known, or should have been known, by the defendants at the time of the execution of the aforesaid lease document, that the leasehold premises consisted of lands and certain improvements there-

on which served no valid business purpose for the Condominium Association, which could not have been provided on the Condominium property itself, had not the Defendants engaged in the scheme to artificially partition the said property so as to create a Condominium Complex under one ownership and a leasehold area under a different ownership so as to enable the Defendants to carry out the illegal tying arrangement aforesaid and illegally obtain monies thereby.

11. That, the said tying arrangement aforesaid, by the device of requiring that all future purchasers of Condominium units at Buckley Towers Condominium attorn to and recognize the leasehold obligations aforesaid, provides thereby for the establishment and maintenance of a minimum resale price on each and every Condominium unit at the aforesaid Condominium Complex since, any future purchaser must, as a condition precedent to the purchase of a Condominium unit, and as a tying arrangement thereby, agree to be bound to pay, as an absolute minimum for the purchase, the rental on the aforesaid recreation lease and, in the event such agreement is not coerced or obtained, the sale of the Condominium unit will not be permitted by the Lessor or assigns of the 99 year lease aforesaid and, the said Lessor may enforce this restraint on alienation of property by certain punitive clauses in the aforesaid leasehold and by economic duress, including, but not limited to, the foreclosure of any ownership interest in the unit by the then unit owner or purchaser.

12. That the Defendants did, together with certain controlled entities and individuals, individually and in conspiracy each with the other, by the device of monopolizing ownership through alter-egos, artificially partitioning land, recording of the aforementioned leasehold document and

declaration of condominium, attempt to and effectively did succeed in monopolizing the sale of Condominium units and tying to the said sales, a contract for the use of a recreational facility and did further, fix a price thereon far in excess of the reasonable value thereof, by the scheme and device of the 99 year lease.

13. That as a result of the aforesaid acts, the Defendants did complete the scheme in restraint of trade and monopolization of such trade and caused a not insubstantial effect upon commerce and damages to Plaintiff and its members.

14. That, as a result of the foregoing, the leasehold contract and tying arrangement, is improper and illegal as violative of 15 U.S.C. 1 and 2 and the general policy of the anti-trust act, and this Court has jurisdiction of this cause due to the foregoing.

WHEREFORE, plaintiff demands the cancelation and rescision of the 99 year lease contract and ancillary obligations; a permanent injunction against the Lessor-trustee, any beneficiaries of the Trustee, any heirs, assigns or successors, in interest to the Trustee, from enforcing any of the terms or conditions of the 99 year lease; restitution and recovery of all monies paid by the Plaintiff or its members to the Defendants as Trustee, or any beneficiary of the Trustee, under the terms of the said 99 year leasehold, as damages thereto, and threefold the damages so sustained by the Plaintiff or its membership, together with the costs of this lawsuit,including but not limited to a reasonable attorneys fee; award to the Plaintiff or its membership of any real property covered by or encumbered by the said leasehold as damages, and such other relief as this Honorable

Court deems fit and proper and further, Plaintiff, on behalf of itself and its membership, demands a trial by jury as to all issues triable as of right by jury hereunder.

COUNT II

15. Plaintiff, on behalf of itself and its membership realleges each and every of the allegations in paragraphs 1 through 14 of this Complaint.

16. That the Defendant, Herbert Buchwald, trustee, has made demands for rental under the aforesaid lease contract and agreements arising from consolidated Civil Action No: 70-23629, 71-551 and 71-1619, all in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, and maintains that the said lease contract is not violative of the anti-trust laws of the United States, to wit: 15 U.S.C.A. 1 and 2, and that Plaintiff herein has obligations to defendant under said lease.

17. That Plaintiff herein is of the belief that the said lease contract and any obligations arising thereunder or ancillary agreements concerning the said lease contract are violative of the anti-trust laws, to wit: 15 U.S.C. 1 and 2, due to the illegal tying arrangement involved in the transaction which bound Plaintiff and its present and future membership to the said lease contract and attendant obligations and that the violations aforesaid are per se violations of 15 U.S.C. 1 and 2, as well as generally violative of the anti-trust acts.

18. That by reason of the foregoing, and the conflicting claims of the Defendant and Plaintiff, Plaintiff is in great doubt as to the legality of the lease contract as

measured against the anti-trust laws, to wit: 15 U.S.C. 1 and 3, and, in accordance with its obligations to itself and its membership, Plaintiff must seek a determination of its rights and obligations under the said statutes as to the terms and conditions of the aforesaid 99 year lease contract and ancillary obligations or agreements arising therefrom.

WHEREFORE, Plaintiff, on behalf of itself and its membership, demands that the Court adjudge:

1. That the aforesaid tying arrangement involving the sale of a Condominium unit to mbmers of Plaintiff, only on the pre-condition that the said members also become obligated under the aforesaid 99 year leasehold contract and ancillary obligations is violative of the anti-trust laws of the United States, to wit: 15 U.S.C. 1 and 2 and that the Court can give ancillary relief thereto to Plaintiff and its membership.

2. That the Court find that the aforesaid tying arrangement violates the general principals and policies as set forth by the United States in its anti-trust laws, to wit: 15 U.S.C. 1 and 2 and is a per se violation of the said anti-trust laws of the United States and non-enforceable by any Court of the United States or the State of Florida or the County of Dade.

3. That all factual questions or issues which are triable as of right by jury, be so tried by a jury.

4. That the Court cancel and rescind the 99 year leasehold contract and any ancillary agreements, contracts or obligations arising thereunder; that the Court permanently enjoin the Lessor, beneficiaries, heirs, assigns or successors

in interest to the lessor or the beneficiaries under the said lease, from enforcing any of the terms or conditions of the aforesaid 99 year lease contract or obligations arising thereunder, restitution and recovery by the Plaintiff and its membership of all monies paid by the Plaintiff or its membership to the Defendants or any beneficiaries pursuant to the aforesaid lease contract as damages, award of any real property covered by the leasehold obligation to Plaintiff and its membership as damages and threefold the damages so sustained by the plaintiff and/or its members, together with the costs and expenses of this lawsuit, including but not limited to a reasonable attorneys fee and such other relief as this Honorable Court deems fit and proper and further, Plaintiff reiterates its demand for a trial by jury as to all issues triable as of right by jury thereunder.

5. That the Plaintiff be allowed to deposit a sum equal to the amount of rentals claimed under the aforesaid 99 year lease contract into the registry of the Court or place same in Treasury Notes or Certificates of Deposit as security for said disputed rentals until the issues in this cause are resolved.

6. That this Court stay any proceedings in the Dade County Circuit Court or other Florida State Courts during the cause of these proceedings or grant such other relief to Plaintiff from State action as the Court deems proper.

BUCKLEY TOWERS CONDOMINIUM, INC, a non-profit Florida condominium corporation, on behalf of itself and its membership.

By: s/ Ignatz Spitz, President
IGNATZ SPITZ, President

LAW OFFICES OF JOSEPH S. PAGLINO
Counsel for Plaintiff
88 N.E. 79th Street
Miami, Florida 33138
(305) 758-8017

By: s/ Joseph S. Paglino
Joseph S. Paglino, Esq.

APPENDIX 11

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

EDWARD W. WADSWORTH
Clerk

Office of the Clerk
Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

September 21, 1976

TO ALL COUNSEL OF RECORD

NO. 75-3403 - Buckley Towers Condominium, Inc.
etc. vs. Herbert Buchwald, etc., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By: s/ Clare F. Sachs
Deputy Clerk

cc: Mr. Joseph S. Paglino
Mr. Darrey A. Davis

Supreme Court, U. S.
FILED
JAN 19 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-636

BUCKLEY TOWERS CONDOMINIUM, INC., a non profit Florida corporation, on behalf of itself and its stockholders and members,

Petitioner,

vs.

HERBERT BUCHWALD, individually and as trustee, and BUCKLEY DEVELOPMENT COMPANY, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

DARREY A. DAVIS
STEEL HECTOR & DAVIS
1400 Southeast First National Bank Building
Miami, Florida 33131
Attorneys for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3080

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-636

BUCKLEY TOWERS CONDOMINIUM, INC., a non profit Florida corporation, on behalf of itself and its stockholders and members,

Petitioner,

vs.

HERBERT BUCHWALD, individually and as trustee, and BUCKLEY DEVELOPMENT COMPANY, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the petitioner condominium association lacks standing to sue for treble damages pursuant to 15 U.S.C., Section 15, in a non-class action, on behalf of itself and on behalf of its members, when it affirmatively appears the association was not the victim of the alleged violations of the antitrust laws and incurred no injury or damage resulting therefrom.

2. Whether the petitioner condominium association lacks standing to sue for injunctive relief in a non-class action on behalf of itself and its members in the absence of any threatened loss or damage to the association from the alleged violations of the antitrust laws.

STATEMENT

This private antitrust action was brought as a non-class action[1] by the petitioner condominium association "on behalf of itself and its stockholders and members." The petitioner (a non profit corporation) does not have stockholders. Its members consist of the record owners of condominium units in the Buckley Towers Condominium. The members of the association change from time to time as the condominium units are bought and sold. Upon the resale of a unit, the seller ceases to be a member of the association and is completely released from all obligations of a unit owner. The buyer, upon record transfer of title to the unit, becomes a new member of the association. Since the creation of the Buckley Towers Condominium on December 17, 1968, a substantial number of condominiums have been sold and resold resulting in constant changes of the petitioner's membership. The membership of the petitioner includes the respondent, Herbert Buchwald, who is the record owner of condominium units. The membership of the association, at any given time, consists of 569 individual unit owners. The member-

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1. The trial court found that:

"Although the Plaintiff purports to bring this action on behalf of its members and stockholders, the association has expressly disclaimed any intention to maintain the present action as a class action. Consequently, there is no need to determine whether the action meets the requirements of Fed. R. Civ. P. 23." 399 F. Supp. 38 (footnote)

This finding was based on plaintiff's representation to the trial court:

"[T]he Defendants mistakenly assume that this action is brought as a class action and this, of course is not the case. The Plaintiff brings the action as a party-plaintiff which has personally suffered damage as a result of a per se violation of the Sherman Act. . . . There is no reason to bring a class action in this case nor would a class action seem to be indicated upon the facts as alleged thus far." (R. 299-300)

ship is limited to the present owners of the condominium units. It does not include any of the innumerable former owners of units who have sold units, but who have the same alleged antitrust claim against respondents. The petitioner association does not purport to assert the antitrust claims of these former owners. A final adjudication of this action would not be binding on the former unit owners who are no longer members of the petitioner condominium association.

Condominium Form of Ownership

The Florida Legislature authorized and accorded statutory recognition to the condominium form of ownership of real property. Chapter 711, Florida Statutes 1963, as amended (Condominium Act), prescribes the substantive legal requirements and governs the property interests, rights and obligations of the persons and entities involved in condominium form of ownership.

The property is subjected to condominium ownership by execution and recordation of Declaration of Condominium by the owner thereof setting out the matters required by the Condominium Act. (Section 711.08, Florida Statutes).

The condominium property consists of two categories (a) the privately owned units, and (b) the remaining condominium property (excluding the units) constituting the common elements, as described in the Declaration of Condominium. The units are owned in fee simple, and title thereto is conveyed by deed describing the particular unit by reference to the recorded Declaration of Condominium. The common elements are owned in common by the unit owners. They are appurtenant to and inseparable from the units, and cannot be conveyed separately from the units. The unit owners are required

to pay the cost of the operation, repair and maintenance of the common elements by periodic assessments. A unit cannot be acquired without inseparable pro-rata ownership of the common elements, and the mandatory obligation for payment of the common expenses for operation, repair and maintenance of the common elements. The common elements include the halls, elevators, lobby and all the condominium property, except the privately owned units. By operation of law, the sale and purchase of a condominium unit is conditioned on common ownership of the common elements and assumption of the obligation for payment of the common expenses. (Section 711.14, Florida Statutes). However, this is not the basis of the tie-in claim in this action.

The Condominium Act provides for a condominium association to be designated in the Declaration of Condominium. The association may be either a corporation for profit or a non profit corporation as prescribed by the Declaration. The current owners of the units, from time to time, constitute the members of the association. The association has no ownership interest in the condominium units or the common elements. It has no property interest in any of the condominium property. The sole responsibility and legal duty of the association is the maintenance of the common elements owned in common by the unit owners. The association assesses and collects from the unit owners periodic payments of the common expenses for maintenance of the common elements. The association has no property or funds of its own. It acts solely as a conduit in collecting the assessments from the unit owners and paying the common expenses from the funds received from the unit owners. The association is neither a purchaser of a unit nor the owner of a unit. It is unaffected by the obligation of a unit owner for payment of the common expenses.

The Condominium Act (Section 711.121) authorizes the association to lease recreation facilities for the enjoyment, recreation, use and benefit of the unit owners. The rental expense for the use of the leased recreation facilities by the unit owners constitutes common expenses paid by the unit owners. The association collects the prescribed rents from the unit owners as part of the common expenses and disburses them to the landlord. The association simply acts as a conduit in collecting the rent from the unit owners and paying it to the lessor. No funds of the association are involved. The common expenses collected from the unit owners include the maintenance of the common elements and the exclusive use of the leased recreation facilities by the unit owners. The recreation facilities provided for the exclusive use and benefit of the unit owners constitute an inseparable part of the condominium property in the same manner as the common elements, and the cost of the use thereof also constitutes a part of the common expenses. The unit owners are not precluded from acquiring the use of any other additional recreation facilities. They are free to utilize any recreation facilities of their own individual choice.

The Buckley Towers Condominium

The statutory authorization of the condominium form of ownership of real property resulted in myriad condominium developments, particularly in the South Florida area. A highly competitive market was created in condominium developments. Virtually all condominium projects of any size included leases of recreation facilities for the reason that recreation facilities were required by prospective purchasers and deemed necessary to meet competition existing in the comprehensive condominium market.

The Buckley Towers Condominium was created and came into existence by virtue of Declaration of Condominium recorded on December 17, 1968, in Official Record Book 6210, at Page 329 of the Public Records of Dade County, Florida. The Declaration of Condominium and attachments thereto, including survey plans of the condominium property, articles of incorporation and by-laws of the condominium association, description of the land, improvements and common elements, and the community facility lease (recreation facilities) were annexed as part of the complaint in this action. (R. 12-153). The condominium property consisted of two seventeen story buildings containing 564 apartment units, 5 shop units, and 23 recreation units. (Exhibit C to Declaration of Condominium).

Respondent, Buckley Development Company, Ltd., owned in fee all the property subjected to condominium ownership, as described in the Declaration of Condominium. The 23 recreation units described in the Declaration were owned in fee by the Respondent, Herbert Buchwald, Trustee. Simultaneously with the recordation of the Declaration of Condominium on December 17, 1968, Herbert Buchwald, Trustee, leased the 23 recreation units to the condominium association for the use and benefit of the unit owners. The Community Facility Lease (recreation facilities) was annexed to and made a part of the recorded Declaration of Condominium as Exhibit D. (R. 12-153). The Declaration expressly provides that the Buckley Towers Condominium was created subject to the Community Facility Lease made a part thereof, as authorized by the Condominium Act. (Section 711.121, Florida Statutes). Upon recordation of the Declaration of Condominium, Buckley Development Company, Ltd., became the sole owner of all the condominium property (units and common elements), subject to the Community Facility Lease of the recreation units owned by Herbert Buchwald,

Trustee. No other persons or entities were involved. All property rights were vested in the respondents.

The Declaration of Condominium and the Community Facility Lease provide that each unit owner is bound by the lease to the same extent and effect as if the unit owner had executed it. It is further provided that the expense of rental and other undertakings set forth in the lease constitute common expenses. The lease further provides that it shall be the duty of the condominium association to assess the unit owners in such amounts as shall be necessary to pay the rental obligations under the lease.

The respondent developer sold out the condominium units to individual buyers who assumed and agreed to be bound by (a) the community facility lease, (b) the obligation to pay the common expenses including the cost of maintenance of the common elements and the use of the leased recreation facilities, and (c) individual purchase money mortgage securing payment of balance due on the purchase price of the unit. Original purchasers have resold units under the same terms and conditions. Upon resale of a unit, the seller ceased to be a member of the association, and the seller was released from all obligations. The articles of incorporation of the condominium association provide:

> 3. QUALIFICATION OF MEMBERS AND MANNER OF THEIR ADMISSION. The members of this corporation shall constitute all record owners of the condominium parcels of the condominium. . . . The membership of the prior owner of such condominium parcel shall be thereby terminated. (Exhibit E to Declaration of Condominium. R. 12-153).

The condominium association did not purchase a condominium unit and never became a unit owner. The asso-

ciation is not a member of the class or group of the purchasers or owners of condominium units subjected to the alleged antitrust violations. The association was not the victim of the alleged antitrust violations. As a non unit owner, the association never assumed the obligations of a unit owner forming the basis of the alleged antitrust claims. The involvement of the association is merely as a conduit receiving and disbursing the rents paid by unit owners, which obligation to pay rent constitutes the alleged injury from the claimed antitrust violations. Petitioner does not purport to make any showing that the alleged antitrust violations resulted in any injury or damage to the association, or that it occupies the status of a purchaser or ultimate consumer at whom the alleged antitrust violations were directed.

Settlement Agreement

The condominium unit owners, as class plaintiffs, and the condominium association sued the respondents herein, as defendants, in the state court challenging the validity of provisions of the Declaration of Condominium. This consolidated litigation culminated in a comprehensive court approved settlement agreement between all the parties resolving all matters of controversy concerning the Buckley Towers Condominium. The settlement agreement provides, among other things, that the validity, enforceability and binding effect of the Declaration of Condominium and Community Facility Lease (recreation facilities) are ratified and confirmed by the unit owners, as class plaintiffs, and the condominium association and its members, and all claims arising therefrom are released (general release). (R. 242-270).

The parties fully performed the settlement agreement for some three years, until November 19, 1974, when the

unit owners and the condominium association repudiated the settlement agreement claiming illegality of the Community Facility Lease. Pursuant to supplementary proceedings, the court ordered that:

> 1. The settlement agreement made and entered into on April 8, 1971, . . . is valid and in full force and effect and binding in all respects on the parties executing the settlement agreement.
>
> 2. All parties, including plaintiff, Buckley Towers Condominium, Inc., and the condominium apartment unit owners and members of said condominium association, as class plaintiffs, are required to comply with, perform, abide by, and live up to the terms and conditions of said settlement agreement, including the Community Facility Lease made a part of the settlement agreement.

See Buckley Towers Condominium, Inc. v. *Buchwald*, 321 So.2d 628 (Fla. 3rd D.C.A. 1975), *appeal dismissed*, 327 So.2d 31 (Fla. 1976), *appeal dismissed*, 330 So.2d 15 (Fla. 1976).

Subsequent Antitrust Action

The condominium association then brought this private antitrust action, as a non-class action, on behalf of itself and its stockholders and members for alleged violations of Sections 1 and 2 of the Sherman Act. (15 U.S.C., Sections 1 and 2).

The first count of the complaint alleged the Declaration of Condominium and the Community Facility Lease constituted an illegal tying arrangement in that the purchasers of condominium units in Buckley Towers were required to accept and ratify the obligation to make rental payments for the use of the leased recreation facilities provided

for the use of the unit owners. The condominium association sought damages pursuant to Section 4 of the Clayton Act (15 U.S.C., Section 15) in treble the amount of all moneys paid by the unit owners under the Community Facility Lease since December 17, 1968.

In addition, although the complaint did not invoke jurisdiction under Section 16 of the Clayton Act (15 U.S.C., Section 26), the association sought (i) the cancellation and rescission of the lease, (ii) a permanent injunction restraining respondents from enforcing the terms of the lease, and (iii) the award to the association of title to the real property covered by the lease.

The second count of the complaint sought injunctive relief in the form of a stay by the federal court of the state court proceedings enforcing the court approved settlement agreement between the parties (*Buckley Towers Condominium, Inc.* v. *Buchwald, supra*), and requested federal court authorization to deposit all rental payments due under the lease in the registry of the court pending final determination of this action.

The respondents moved to dismiss on various grounds, including the following (R. 164-165):

> 5. To dismiss the action because the plaintiff lacks standing to sue under 15 U.S.C. Sec. 15 as a person injured in its business or property, in that, plaintiff is not shown to have purchased or acquired a condominium apartment unit (tying product) under the alleged illegal tying arrangement or paid any of its own funds as rents on the recreation lease (tied product).

Pursuant to evidentiary hearing set by court order (R. 228), the district court granted respondents' motion to dismiss the action for failure to state a claim upon

which relief can be granted on the ground that, since the condominium association never purchased a condominium unit, it lacked standing to complain of the alleged antitrust violations. *See Buckley Towers Condominium, Inc.* v. *Buchwald,* 399 F. Supp. 38 (S.D. Fla. 1975).

Same Antitrust Action Refiled

Upon dismissal of this action on July 31, 1975, the identical action was refiled on August 6, 1975, as a class action, by the condominium association "individually and on behalf of its membership" and by a unit owner (Ignatz Spitz) "individually and on behalf of all residential unit owners at the Buckley Towers Condominium." (R. 321-334). The complaint alleges that the action is refiled "pursuant to the mandate as set forth in the Order of Dismissal bearing date 31 July 1975." (R. 324).

The same question of the standing of the condominium association is presented in the refiled action. The standing question has been briefed and argued to the Fifth Circuit Court of Appeals on appeal taken from Order of Dismissal of the refiled action. The Court of Appeals is urged to reconsider its decision which is the subject of this certiorari proceeding. (Court of Appeals Case No. 76-1848, argued December 16, 1976). The pending appeal also involves the question whether the alleged antitrust claim is barred under the limitations statute. The district court held that it was.

Decision of Court of Appeals

On the basis of the undisputed facts shown by the record, the court of appeals affirmed the decision of the district court. *See Buckley Towers Condominium, Inc.* v. *Buchwald,* 533 F.2d 934 (5 Cir. 1976).

As the court pointed out, the gravamen of the condominium association's antitrust claim is that the Declaration of Condominium and Community Facility Lease recorded on December 17, 1968, governing the Buckley Towers Condominium, created a tying arrangement in violation of Section 1 of the Sherman Act. The association asserts that under the condominium documents the purchaser of a condominium unit is required to accept, ratify and be bound by the terms of the lease, and the obligation to pay the rent prescribed by the lease for the use of the leased recreation facilities. The alleged tied product is the recreation facilities and the obligation to pay for the use thereof, and the tying product is the condominium units. The sale of condominium units is conditioned upon acceptance of and payment for the use of the leased recreation facilities. The obligation to pay for use of the leased recreation facilities is tied to the purchase of a condominium unit. However, there is no requirement that the unit owners utilize only the leased recreation facilities in the Buckley Towers Condominium. The unit owners are perfectly free to acquire or use any other recreation facilities.

The condominium association has never purchased a condominium unit nor become a unit owner. The association is not a purchaser of the tying product nor an ultimate consumer affected by the alleged tying arrangement. The use of the leased recreation facilities is limited to unit owners. Only unit owners have the obligation to pay rent for the use of the leased recreation facilities. The association does not pay the rent for use of the leased recreation facilities. The association merely assesses and collects the rents prescribed by the lease from the unit owners and transmits the funds paid by the unit owners to the landlord. The association is not in anywise involved in the alleged tying arrangement either as a purchaser

of the tying product or as a consumer of the tied product. It serves only as a conduit in collecting the common expenses from the unit owners and paying therefrom the rental for the use of the leased recreation facilities by the unit owners.

Given these factual circumstances, the court of appeals relied on the cited authorities as the basis for its decision that the district court correctly determined the condominium association lacked standing to maintain this action.[2]

The court of appeals stated the standard applied to the facts in this case as follows: (533 F.2d at 935).

> [I]n order to have standing to maintain an action for treble damages under Section 4 of the Clayton Act a plaintiff must satisfy two criteria: (1) the plaintiff must demonstrate an injury to its "business or property", and (2) the plaintiff must show that this injury was the result of the defendant's illegal activities. . . .

With respect to the association's claim for injunctive relief, the court stated that, leaving aside the alleged damage to the unit owners, the association has not alleged, and the court is unable to apprehend, any threatened damage cognizable in equity proximately resulting from the alleged antitrust violation sufficient to confer standing upon the association, even under the more liberal standards of Section 16 of the Clayton Act. (533 F.2d 938).

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2. *Battle* v. *Liberty National Life Insurance Company*, 5 Cir. 1974, 493 F.2d 39, *cert. denied* 1975, 419 U.S. 1110, 95 S. Ct. 784, 42 L. Ed. 2d 807; *Hawaii* v. *Standard Oil Company of California*, 1972. 405 U.S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184; *Dailey* v. *Quality School Plan, Inc.*, 5 Cir. 1967, 380 F.2d 484; *Martin* v. *Phillips Petroleum Company*, 5 Cir. 1966, 365 F.2d 629, *cert. denied* 385 U.S. 991, 87 S. Ct. 600, 17 L. Ed. 2d 451.

The court then considered the injunction claim in the light of the decision in *Warth* v. *Seldin*, 1975, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343. The court recognized the rule that, even in the absence of injury to itself, an association may have standing solely as the representative of its members, where its members are suffering immediate or threatened injury. However, the court relied on the limitation that the association must show that:

> [T]he nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, . . . (533 F.2d at 938).

ARGUMENT

I

The petitioner condominium association lacks standing to sue for treble damages pursuant to 15 U.S.C., Section 15, in a non-class action, on behalf of itself and on behalf of its members, when it affirmatively appears the association was not the victim of the alleged violations of the antitrust laws and incurred no injury or damage resulting therefrom.

It has been observed that the Supreme Court has not passed directly on the standing requirement in treble-damage cases. *State of Illinois* v. *Ambress Brick Company, Inc.*, 536 F.2d 1163 (7 Cir. 1976); ABA Antitrust Section, *Antitrust Law Developments*, 1973, at 257. But the court has not expressly overturned decisions to the effect that in order to establish "standing" the plaintiff must show an injury in fact that is "arguably within the zone of interests to be regulated by the statute." *Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9 Cir. 1970), *cert.*

denied 402 U.S. 923; *Calderone Enterprises Corporation* v. *United Artists Theatre Circuit*, 454 F.2d 1292 (2 Cir. 1971), *cert. denied* 406 U.S. 930. Despite extensive litigation of the standing issue in lower courts, the Supreme Court has offered surprisingly little guidance on the standing question. *Tugboat, Inc.* v. *Mobile Towing Co.*, 534 F.2d 1172, 1174 (5 Cir. 1976).

The Fifth Circuit, in *Battle* v. *Liberty National Life Insurance Company*, 493 F.2d 39, 49 (5 Cir. 1974), stated:

> In this circuit the limitation of this principle has been stated as requiring the plaintiff to show that he is "within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby." . . .
>
> And in *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129, 1131 (5 Cir. 1975), the Fifth Circuit stated:
>
> > To attain standing a person (whether corporation or individual) must be one against whom the conspiracy is aimed. Or, put in plutonomic terms, the complainant must show that he is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry. (Citations omitted).

The decision in the instant case applies the "zone of interest" test of standing to the facts reflected by the record. It is submitted that the facts in this case demonstrate the lack of standing of the condominium association to sue for the recovery of treble damages in its own right under any concept of justiciability.

The doctrine of standing poses the question whether a particular person is a proper party to litigate a given issue. The clear requirement of Section 4 of the Clayton

Act is that plaintiff must have suffered injury at the hands of the defendants before he can bring an action. This prerequisite both defines the real party in interest and satisifes the minimum criterion of justiciability established by Article III of the Constitution. *Malamud* v. *Sinclair Oil Corporation*, 521 F.2d 1142, 1149 (6 Cir. 1975).

In *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Company*, 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328, the court observed that:

> The (Sherman) Act is comprehensive in its terms and coverage, protecting all who are made *victims* of the forbidden practices by whomever they may be perpetrated. . . . (Emphasis supplied).

And the decision in *Radovich* v. *National Football League*, 352 U.S. 445, 1 L. Ed. 2d 456, 77 S. Ct. 390, states:

> Petitioner's claim need only be "tested under the Sherman Act's general prohibition on unreasonable restraints of trade," (citation omitted), and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the *victims* of the forbidden practices as well as the public. (Citation omitted) (Emphasis supplied).

The decision in *Data Processing Service* v. *Camp*, 397 U.S. 150, 25 L. Ed. 2d 184, 90 S. Ct. 827, warns that:

> Generalizations about standing to sue are largely worthless as such . . .

and then delineates the threshold question as follows:

> The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. . . .

Hawaii v. *Standard Oil Co.*, 405 U.S. 251, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972), concludes that the injury to "business or property" requirements of Section 4 of the Clayton Act refer to "commercial interests or enterprises." It is further indicated that recovery in damages is authorized only for those injuries suffered to business or property in the capacity of a consumer of goods and services.

In the instant case, it is alleged that the condominium documents annexed to the complaint constitute the alleged tie-in violation of the Sherman Act. It affirmatively appears on the face of the condominium documents that the petitioner condominium association is not the "victim" of the alleged tying arrangement, and suffered no injury to its business or property by reason of the alleged antitrust violation. The association was not a purchaser of the alleged tying product, nor a user or ultimate consumer of the alleged tied product. The association is not arguably within the zone of interests to be regulated by the statute.

II

The petitioner condominium association lacks standing to sue for injunctive relief in a non-class action on behalf of itself and its members in the absence of any threatened loss or damage to the association from the alleged violations of the antitrust laws.

The complaint in this action does not purport to invoke jurisdiction under Section 16 of the Clayton Act, 15 U.S.C., Section 26. There is no showing of any "threatened in-

jury." The condominium documents annexed to the complaint demonstrate the absence of possibility of any "threatened injury" to the association.

The Court of Appeals found that:

> Similarly lacking in merit is the appellant's fallback assertion that it had standing to maintain on behalf of itself and its members an action for injunctive relief under Section 16 of the Clayton Act. Title 15, U.S.C., Section 26. Although Section 16 is broader than Section 4 in that it does not require an injury to "business or property", in order to achieve standing under Section 16 a plaintiff must demonstrate a loss or injury cognizable in equity proximately resulting from the alleged antitrust violation. (Citations omitted). Leaving aside the alleged damage to the residential condominium unit owners the appellant-association has not alleged and we do not apprehend any damage cognizable in law or equity sufficient to confer standing to sue upon Buckley even under the eased requirements of Section 16. (533 F.2d at 938).

Section 16 of the Clayton Act involves traditional principles of equity and authorizes injunctive relief upon the demonstration of "threatened injury." It is not necessary to show actual injury, but there must be a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 23 L. Ed. 2d 129, 89 S. Ct. 1562.

The Fifth Circuit has consistently determined standing to sue for injunctive relief pursuant to Section 16 of the Clayton Act in accord with the *Zenith* decision, *supra*. *See Credit Bureau Reports, Inc.* v. *Retail Credit Company,*

476 F.2d 989 (5 Cir. 1973); *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129 (5 Cir. 1975); and *Tugboat, Inc.* v. *Mobile Towing Co.*, 534 F.2d 1172 (5 Cir. 1976).

Standing of Association to Sue on Behalf of Members

Since the record clearly demonstrates that the condominium association lacks standing to sue in its own behalf for the alleged antitrust violations, the question remains as to its standing to sue, in a non-class action, on behalf of its members, the present condominium unit owners, including the respondent, Herbert Buchwald.

The association brought this action on behalf of, and against, the respondent member of the association without his knowledge, consent or authorization, and against his will. It is not known whether there may be other unwilling members on whose behalf the association purports to sue. There are 569 members of the association, 564 apartment unit owners and 5 shop unit owners. There is no showing that the members authorized or consented to the association bringing this action on their behalf, despite the opportunity afforded at the evidentiary hearing before the district court. This non-class action does not accord to the members the benefit of the Rule 23 notice requirements afforded by a class action nor the opportunity to request exclusion from the class prescribed by the Rule.

Since the members of the association consist solely of the current unit owners, this action does not include the antitrust claims of any of those individuals who purchased units during the period from December 17, 1968, and sold their units and thereupon ceased to be members of the association. The respondent developer, Buckley Development Company, Ltd., sold out all the condominium units to original purchasers on April 8, 1971, and has not since then participated or engaged in the alleged tying arrangement

complained of in this action. The respondent developer was not involved in the resale of the condominium units by the original purchasers. Upon the creation of the Buckley Towers Condominium on December 17, 1968, the respondent developer was the record owner of all 569 of the condominium units and, therefore, the sole member of the association and the only victim of the alleged tying arrangement. The respondent developer ceased to be a member of the association on April 8, 1971, when it sold the last unit.

Under the circumstances, it is uncertain as to what claimants and interests might be bound by a final adjudication in this non-class action, and as to the extent that respondents would be subjected to liability for the same antitrust claims.

The mootness of the standing issue in this case is suggested by reason of the pending class action brought by a unit owner on behalf of all other unit owners and by the condominium association on behalf of itself and on behalf of its members alleging the same antitrust claim against the respondents herein. (R. 321-334).

The Court of Appeals in the instant action, cited and recognized that *Warth* v. *Seldin*, 422 U.S. 490, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975), holds that:

> There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association may enjoy. Moreover, in attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties. . . .

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The association must allege that its members, or any of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . .

The Court of Appeals relied on and applied the limiting statement in *Warth, supra,* that:

> So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

The conclusion is inescapable that in the instant case the nature of the claim and the relief sought makes the individual participation of all the class of unit owners, as the injured parties, indispensable to the proper resolution of the cause. The mere convenience of the association should not be accommodated to the detriment of the rights of the respondents. In this case, the class action suit commenced by the unit owners better serves the interests of all the affected persons.

Citing *Warth* v. *Seldin, supra,* the decision in *Simon* v. *Eastern Kentucky Welfare Rights Organization,* ..... U.S. ....., 48 L. Ed. 2d 450, at 461, states:

> Since they (five organizations) allege no injury to themselves as organizations, and indeed could not in the context of this suit, they can establish standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right. . . .

Notwithstanding as a general principle an association may sue on behalf of its members in the absence of injury to itself, the standing to bring a private antitrust action for treble damages is governed by the requirements of Section 4 of the Clayton Act, 15 U.S.C., Section 15. This controlling statute expressly confers standing solely on "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." The language of the statute places a limitation on standing to bring this private antitrust action.

Summary

Petitioner lacks standing to sue on behalf of itself and its members under Section 4 and Section 16 of the Clayton Act, 15 U.S.C., Sections 15 and 26. The condominium association has never purchased the alleged tying product, a condominium unit, nor has it been the ultimate consumer of or made payment for the recreation facilities, the alleged tied product. In no way has the condominium association been affected by the alleged tying arrangement. Accordingly, the association has not suffered and cannot be threatened with injury so as to invoke jurisdiction on behalf of itself under Sections 4 and 16 of the Clayton Act.

The issue of whether the association has standing to sue on behalf of its members in the absence of injury to itself is now moot by reason of the pending class action commenced by a unit owner on behalf of all other unit owners and by the condominium association on behalf of itself and on behalf of its members alleging the same antitrust claim against respondents herein. Moreover, Section 4 of the Clayton Act, the statutory provision on which petitioner's claim rests, cannot properly be understood as granting an association standing to sue on behalf of its

members in the absence of injury to itself. This governing statute provides standing to sue solely to a person who shall be *injured* in *his* business or property.

CONCLUSION

The petition for a writ of certiorari to review the Fifth Circuit's decision in *Buckley Towers Condominium, Inc.* v. *Buchwald*, 533 F.2d 934 (5 Cir. 1976), on alleged ground of conflict, should be denied.

Respectfully submitted,

DARREY A. DAVIS
STEEL HECTOR & DAVIS
1400 Southeast First National Bank Building
Miami, Florida 33131
Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief of Respondents in Opposition have been furnished to JOSEPH S. PAGLINO, Esquire, 88 N. E. 79th Street, Miami, Florida 33138, Attorney for Petitioner, by mail, in accordance with Rule 33, this 18th day of January, 1977.

DARREY A. DAVIS
Attorney for Respondents

Supreme Court, U. S.
FILED
FEB 15 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-636

BUCKLEY TOWERS CONDOMINIUM, INC., a non profit Florida Corporation, on behalf of itself and its stockholders and members,

Petitioner,

versus

HERBERT BUCHWALD, individually and as trustee, and BUCKLEY DEVELOPMENT COMPANY, LTD.,

Respondents

REPLY BRIEF OF PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

CASE NO. 76 - 636

BUCKLEY TOWERS CONDOMINIUM, INC., a non profit Florida corporation, on behalf of itself and its stockholders and members,

Petitioner,

versus

HERBERT BUCHWALD, individually and as trustee, and BUCKLEY DEVELOPMENT COMPANY, LTD.,

Respondents

REPLY BRIEF OF PETITIONER

STATEMENT

Petitioner must respectfully differ with the Statement of Respondent In Opposition as to the following:

A. The membership of the Buckley Towers Condominium Association consists of more than one thousand individuals, not 569 individual unit owners as set forth in the statement of Respondents.

B. Petitioners-Plaintiffs did not take the position that no individual unit owners should be added as parties if, in the view of the Trial Court, an action in the nature of a class action was required.[1] In fact, in the opinion of the United

1. Subsequent to the dismissal of this cause an individual class action was filed in the United States District Court, but it too was dismissed.

States Court of Appeals, Fifth Circuit, giving rise to this Petition, 533 F. 2d 934 (5th Cir. 1976), the Court stated:

> "Subsequent to the entry of the Order of Dismissal the Appellant on August 11, 1975, moved the District Court for clarification of the Order of Dismissal, and for leave to amend the Complaint and to add or join as parties plaintiff the residential condominium unit owners. . ."
>
> ". . .the District Court denied the Appellant's Motion for leave to amend the complaint. . ."

C. Respondents represent in their statement that "the Condominium property consists of two categories (a) the privately owned units, and (b) the remaining condominium property (excluding the units) constituting the common elements, as described in the Declaration of Condominium.

The statement is not precise. In fact, the "Condominium" consists of *three* categories (a) the privately owned units, and (b) the remaining condominium property which constitutes common elements and (c) the unwanted 99 year "recreation lease".

If the contractual matters involved in this cause involved only the individual dwelling units and the common elements, which are owned in common by all unit owners, there would have been no reason for the institution of any action below. However the third element, the unwanted "recreation lease", a useless and parasitic appendage to the condominium without any social, business or other justification, *is* involved in this case and other cases similar to this one. See: *Burleigh House Condominium, Inc. vs. Burleigh House, Inc., et al.,*

F. 2d (5th Cir. 1977). (App. 1).

D. Respondents statement alleges or concludes that the Condominium Association has *no property interest* in any of the condominium property. This is not so. In the "Settlement Agreement" referred to in the brief of Respondents (R. 242-270), the Association is clearly shown to have property rights to 20 individual dwelling units. Beyond that, the Condominium Association has vested property interests in the condominium by virtue of recorded documentation creating and continuing the Condominium in existence.

Additionally, only the Condominium Association can enter into agreements affecting the property which consists of common elements (Fla. Stat. 718). In the same vein, Respondent's flat statement that the sole responsibility and legal duty of the Association is the maintenance of the common elements owned in common by the unit owners is factually incorrect. Among the responsibilities and legal duties of the Association is the duty to keep the Association solvent, to raise revenue, pay the obligations of the Association, to enter into contracts for the condominium with suppliers, etc., and to act rationally in conducting the corporate affairs of the condominium.

Nothing prohibits a condominium corporation in the State of Florida, whether a corporation for profit or a non-profit corporation from purchasing real estate, leaseholds or other possessory or use interests and, in fact, such purchases are expressly authorized by *Fla. Stat.* 711.121 (Appendix 2, Petitioners Brief in Support of Writ of Certiorari, now *Fla. Stat.* 718).

E. Respondents take the position in their statement that

the Condominium Association is merely a "conduit" and has the ability to assess ever-increasing amounts of money against its membership in order to pay the continually increasing rentals and other expenses required by the terms and conditions of the unwanted "99 year recreation lease". The assertion is not tenable since, as is the case in any business or tax situation of this type, the well is not bottomless. Assessments, like taxes, must be rational and not confiscatory.

The Condominium Association in the instant case, like other Condominium Associations, has some income from sources other than unit owners and is charged with making expenditures of all income on a reasonable basis, it must live within its budget and within the confines of reason and economic reality. The directors have fiduciary responsibilities.

The position taken by Respondents in their statement leads to the inescapable conclusion that the Lessor of the 99 year lease contract must ultimately gain possession of all of the individual condominium units and all of the condominiums property through the enforcement of Respondent's liens on the property, since it is mathematically and economically impossible to sustain and keep current the 99 year lease.

The offensive contract has already forced this and other actions and no relief is in sight.

Also disputing the "conduit" theory is the fact that Respondent Buchwald has sued Petitioner for recovery of legal fees for the defense of *this* anti-trust action. The action was filed in the State Court, in the Eleventh Judicial Circuit in and for the Dade County, Florida. *Buchwald vs. Buckley Towers Condominium, Inc.*, 76-33461 (18).

Denying a Motion to Dismiss and disregarding established law as expressed in *Byram Concretanks, Inc. vs. Warren Concrete Products Co.*, 374 F. 2d 649 (3rd Cir. 1967), that no attorneys fees can be recovered for a successful defense of an anti-trust action in a United States District Court, the State Court has held that such an action may be maintained in a *State* Court, (App. 2) even though it could not be maintained in a Federal Court.

Thus, for practical purposes, Respondents assertion that Petitioner is a "mere conduit" is not tenable.

F. Respondents also represent in their statement that "the recreation facilities provided for the exclusive use and benefit of the unit owners constitute an inseparable part of the condominium property in the same manner as the common elements. . ."This is absolutely *not* the case. The recreational lease is not only unwanted, but is completely *unnecessary* to the operation or existence of the Condominium. Nor is the lease inseparable. In fact, the lease premises are separated by legal description and are physically separate from the units and common elements.

G. Respondents also state that "they (members of the Association) are free to utilize any recreational facility of their own individual choice". This is a half truth. The Association may be theoretically free to utilize any recreational facilities of their own individual choice, but practically, *economically* and contractually it is impossible to do so since the Association and its members are tied forever (99 years) to the economic bondage and harsh realities of the 99 year lease which financially precludes them from the purchase of necessities for the condominium, let alone the use of other recreational facilities.

H. Respondents state that "the Association was not the victim of the alleged antitrust violation" (P. 8 - *Brief of Respondents).* The Association disputes this position. The Association is a victim and directly affected since *it must pay* the monies under the disputed contract. The Court should note that the Condominium Association is named as the Lessee in the contract and is bound to pay all the obligations of the 99 year lease *en toto* whether an individual unit owner pays an assessment levied against it or not. The Association must draw on other sources of income to make the payment, foregoing necessary purchases and, in practice, this is what occurs.

Additionally, failure of Petitioner to make the required rental and other payments of the 99 year lease results in state litigation against respondent and appointment of a receiver, to sequestrate funds and assets of petitioner, Buckley Towers, Inc. vs. Buchwald, 321 So. 2d 628 (Fla. App. 1976), etc., all of which has happened to Petitioner in this cause and which caused Petitioner and other corporate Condominium Associations in the position of Petitioner to seek relief in the Federal Courts.

I. The "Settlement Agreement" repeatedly referred to in the brief of respondents is nothing more than an agreement *signed by the respondents or their designees* in this cause between interrelated and interlocking entities, *prior to the assumption of control of the Condominium Association by its present unit owners.* That is to say, designees of the Respondents (including undisclosed owners of the 99 year lease) in this cause controlled all entities that executed the Settlement Agreement at the time it was signed for both Petitioner and Respondent.

In effect, Respondents left hand and right hand signed the Agreement and, since the Agreement was incorporated in a "friendly lawsuit" between the designees, it has been continually imposed upon Petitioner by State Court action on the theory that the Agreement is part of a Final Judgment binding on State Courts.

Not having been given the opportunity to present evidence or testimony in the District Court on the issues of standing or jurisdiction, Petitioner was unable to present its case to that Court.

RESPONSIVE ARGUMENT

Respondents essentially claim in their brief that Petitioner has not used the proper "magic words" to show standing in the complaint filed by Petitioner. This is apposite to the record *and* established law relating to standing. All that need be alleged, to show *standing* to state a claim in a case of this nature is a per se violation of the Sherman Act which damages the Plaintiffs personally. *Northern Pacific Ry. Co. vs. United States,* 365 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). Proof in support of the allegations should be permitted. *Hospital Building Co. vs. Trustees of Rex Hospital,* 96 S. Ct. 1848, 48 L. Ed. 2d. 338 (1976).

Since the complaint was dismissed prior to any evidentiary hearings (in fact, Petitioners request for an evidentiary hearing was denied by the Trial Court) it would appear that the dismissal was, at the very least premature, and predicated upon a misapplication of precedent.

Petitioner herein has rights and duties at law. It has alleged substantial adverse effects upon interstate commerce

and serious injury and damage to itself which entitle it to relief pursuant to 15 U.S.C. 26 as a result of per se violations of the antitrust laws of the United States and has alleged that the cause of such damage are the Respondents activities and imposition of the 99 year lease contract.

Respondents would have each of the hundreds of thousands of the individual members of corporate condominium associations such as Petitioner, bring individual actions when it is readily apparent that the actions can be manageably brought by individual corporate condominium associations to effect the exact same relief which could be sought by the individuals (The U.S. District Court has refused to permit individual actions in any event).

The bare conclusionary statements by Respondent that "the Association has not suffered and cannot be threatened with injury so as to invoke jurisdiction on behalf of itself" is erroneous and not supported by the record in this cause.

No evidentiary hearing on this issue was permitted.

The question is of such importance to Petitioner and other corporate condominium associations throughout the various Circuits which are in similar positions of financial extremis due to these illegal contracts and arrangements that this Court should grant certiorari and oral argument to determine the issues of standing and jurisdiction presented in this petition.

CONCLUSION

For the reasons and arguments of law stated in the Petition for Writ of Certiorari and brief in support of Petition and

those set forth herein, this Court should issue a Writ of Certiorari to review the Fifth Circuit's decision in *Buckley Towers Condominium, Inc. vs. Buchwald*, 533 F. 2d 934 (5th Cir. 1976), due to the demonstrated conflict between the Circuits, for the reason that housing, a basic necessity of life is involved and additionally,due to the wide application and seriousness of the questions presented.

Respectfully submitted:

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Tel. (305) 758-8017

By: _____
Joseph S. Paglino, Esq.

CERTIFICATION

IT IS HEREBY CERTIFIED that three copies of the foregoing Reply Brief of Petitioner, were mailed this 11th day of February, 1977 to Darrey A. Davis, Esq., Steel Hector & Davis, Counsel for Respondent, 1400 S. E. First National Bank Building, Miami, Florida 33131, in accordance with Rule 33 of the Supreme Court.

By: _____
Joseph S. Paglino, Esq.
Attorney for Petitioner

OPINION OF FIFTH CIRCUIT COURT OF APPEALS

BURLEIGH HOUSE CONDOMINIUM, INC., a non profit Florida Corporation, on behalf of itself and its membership, Plaintiff-Appellant,

v.

Herbert BUCHWALD, Individually, and as Trustee, and Burleigh House, Inc., a Florida Corporation for profit, Individually, jointly and severally, Honorable Robert Shevin, as Representative of the State of Florida, Defendants-Appellees,

No. 76-1847

United States Court of Appeals, Fifth Circuit

Jan. 26, 1977

A condominium association brought action for alleged violations of the Sherman Act. The United States District Court for the Southern District of Florida at Miami, C. Clyde Atkins, J., denied a motion to dismiss. The defendants appealed. The Court of Appeals held that the condominium association lacked standing to sue as a real party in interest under antitrust statutes.

Judgment vacated and case remanded for entry of order of dismissal.

Monopolies - 28(1.6)

Condominium association lacked standing to sue as real

party in interest under antitrust statutes. Sherman Anti-Trust Act,§§ 1, 2, 15 U.S.C.A. §§1, 2; Clayton Act, §4, 15 U.S.C.A.§ 15.

Appeal from the United States District Court for the Southern District of Florida.

Before GEWIN, GEE and FAY, Circuit Judges.

PER CURIAM:

Appellant, Burleigh House Condominium, Inc., a non-profit Florida condominium association, brought this action on behalf of itself and its membership against the developer, Burleigh House, Inc., and Herbert Buchwald, Trustee of the Burleigh House Condominiums for alleged violations of the Sherman Act, 15 U.S.C.§§ 1 and 2. This cause went to trial and, at the close of the evidence offered by appellant, the district court granted appellee's motion for directed verdict. The condominium association appealed on several grounds but we will not reach those issues. This Court's primary concern is whether or not the condominium association has standing to sue as a real party in interest under 15 U.S.C. §15. This question was raised by the appellees in their motion to dismiss filed March 4, 1975 which the district court denied.

In a case with remarkably similar facts and issues this court held that a condominium association lacks standing to maintain an action under the antitrust statutes. *Buckley Towers Condominium, Inc. v. Buchwald*, 533 F.2d 934 (5th Cir. 1976).

Therefore, we vacate the judgment of the trial court and remand for entry of an order of dismissal.

APPENDIX 2

COMPLAINT FOR ATTORNEYS' FEES

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CIVIL ACTION NO. 76-33461

HERBERT BUCHWALD, TRUSTEE,
Plaintiff,

vs.

BUCKLEY TOWERS CONDOMINIUM, INC., a Florida non profit corporation,
Defendant,

COMPLAINT FOR ATTORNEYS' FEES

Plaintiff, HERBERT BUCHWALD, TRUSTEE, sues defendant, BUCKLEY TOWERS CONDOMINIUM, INC., a Florida non profit corporation, and alleges:

1. This is an action for recovery of attorneys' fees in excess of $2,500.00 due and owing by defendant to plaintiff under and pursuant to the terms of the court approved settlement agreement of the parties and the Buckley Towers Community Facility Lease incorporated in the settlement agreement.

2. Plaintiff, as lessor, and defendant, as lessee, made and

entered into a written lease, entitled Buckley Towers Community Facility Lease, dated December 17, 1968, and recorded December 18, 1968, in Official Record Book 6210, at Page 443 of the Public Records of Dade County, Florida, wherein and whereby the property and premises described therein were leased and demised upon the terms and conditions therein prescribed.

3. The said Buckley Towers Community Facility Lease provides in pertinent part:

> *Attorneys' Fees and Costs.*
>
> The Lessee (defendant herein) shall pay to the Lessor (plaintiff herein) all costs of court. . . and reasonable attorneys' fees, including fees in connection with procedures in the nature of appeal, incurred or expended by the Lessor in enforcing the terms of this lease. The amount of such costs and fees may, at the option of the Lessor, be collected just as though the said amount were rent then maturing and becoming due thereunder.

The lease between the parties further provides:

> *Indemnification.*
>
> The Lessee (defendant herein) indemnifies and agrees to save harmless the Lessor (plaintiff herein) from and against any and all claims, debts, demands or obligations which may be made against the Lessor . . . arising by reason of or in connection with the making of this lease. . . and if it be-

> comes necessary for the Lessor to defend any actions seeking to impose any such liability, the Lessee will pay to the Lessor all costs and reasonable attorneys' fees incurred by the Lessor in effecting such defense in addition to any other sums which the Lessor may be called upon to pay by reason of the entry of a judgment . . .

4. Thereafter, on April 8, 1971, the parties entered into a comprehensive agreement resolving all matters of controversy existing between them. The defendant lessee, and its members, the condominium unit owners, as class plaintiffs in consolidated litigation pending before this Court (Consolidated Cases Nos. 70-23629, 71-551 and 71-1619) executed the settlement for the purpose of ratifying confirming and approving the validity and enforceability of the terms of the Buckley Towers Community Facility Lease. The lease was secured by collateral assignment of the rents by special bank deposits. The settlement agreement was approved by order of court pursuant to joint request of the parties.

5. The parties performed all the terms of the settlement agreement and the Community Facility Lease until November 19, 1974, when the defendant lessee questioned the legality of the Community Facility Lease and refused to pay the rent prescribed therein. The defendant lessee, having performed the terms and conditions of the settlement agreement for more than three years and having accepted the benefits of the settlement agreement, repudiated and refused to be bound by the terms thereof contending that the Community Facility Lease was invalid and unenforceable.

6. The plaintiff lessor brought proceedings in this Court seeking enforcement of the settlement agreement and the

terms of the Community Facility Lease incorporated as part of the settlement agreement. Pursuant to such proceedings, the Court on February 6, 1975 rendered an order enforcing the settlement agreement, adjudicating in pertinent part:

> 1. The settlement agreement made and entered into on April 8, 1971, . . . is valid and in full force and effect and binding in all respects on the parties executing the settlement agreement.
>
> 2. All parties, including plaintiff condominium association, Buckley Towers Condominium, Inc., and the condominium apartment unit owners and members of said condominium association, as class plaintiffs, are required to comply with, perform, abide by, and live up to the terms and conditions of said settlement agreement, including the Community Facility Lease made a part of the settlement agreement.

On appeal taken by the defendant lessee, the appellate courts affirmed the decision of this Court. *See Buckley Towers Condominium, Inc. v. Buchwald*, 321 So. 2d 628 (3rd D.C.A. 1975), *appeal dismissed*, 327 So. 2d 31 (Fla. 1976), *appeal dismissed*, 330 So. 2d 15 (Fla. 1976).

7. Notwithstanding the decision of the courts adjudicating the validity of the Community Facility Lease, the defendant lessee sued the plaintiff lessor in the United States District Court (Case No. 75-38-Civ-JLK), alleging that the Community Facility Lease was invalid and unlawful under federal antitrust laws, and demanding (a) cancellation and rescission of the lease and all obligations thereunder, (b) injunction against the enforcement of the terms and conditions of the

lease, (c) restitution and recovery of all rents paid since 1968 as damages and attorneys' fees, and (d) award of the demised property and premises to the lessee and its members as damages. After extensive proceedings, the court dismissed the action for failure to state a claim upon which relief can be granted. *See Buckley Towers Condominium, Inc. v. Buchwald*, 399 F. Supp. 38 (S.D. Fla. 1975). On appeal taken by the lessee, the United States Court of Appeal affirmed the decision of the trial court. *See Buckley Towers Condominium, Inc. v. Buchwald*, 533 F.2d 934 (5 Cir. 1976), and denied the lessee's petitions for rehearing.

8. On December 18, 1975, the lessee, Buckley Towers Condominium, Inc., sued the lessor, Herbert Buchwald, Trustee, in the United States District Court (Case No. 75-3002-Civ-JE) claiming the state court enforcement of the terms of the Community Facility Lease violated the constitutional rights of the lessee under the federal civil rights law (42 U.S.C. Sec. 1983). The lessee demanded an injunction against the lessor temporarily and permanently enjoining any action seeking enforcement of the terms of the Community Facility Lease and the collection of the rent prescribed in the lease. Pursuant to extensive proceeding, the federal court on February 23, 1976, dismissed the lessee's civil rights action adjudicating in pertinent part that:

> (T)he Court finds that all matters presented in the complaint in this cause, including Federal constitutional questions, have been presented to the State Courts of Florida and most are now pending there. This Court has no supervisory authority over any State Court. The Plaintiff has heretofore chosen its forum.

Accordingly, it is ordered and adjudged that the complaint in this cause is dismissed without prejudice.

9. By reason of the actions of the defendant lessee, Buckley Towers Condominium, Inc., in attacking the validity and enforceability of the Community Facility Lease by the Federal court proceedings aforesaid, the plaintiff lessor, Herbert Buchwald, Trustee, has been compelled to retain counsel to defend him in such litigation and to protect and preserve his rights in enforcing the terms of the lease. The plaintiff lessor agreed and obligated himself to pay reasonable attorneys' fees to his undersigned counsel for the legal services reasonably and necessarily required in connection with the defense of the federal court actions brought by the defendant lessee involving the validity of the Community Facility Lease and the enforcement of the terms thereof, with the understanding that the amount constituting fair and reasonable attorneys' shall be fixed and determined by the Court in accordance with the terms of the Community Facility Lease and in the light of the circumstances involved.

10. Plaintiff avers that, under the terms of the Community Facility Lease hereinabove set out, the defendant lessee is under a legal duty to indemnify and hold plaintiff harmless and to reimburse plaintiff for reasonable attorneys' fees incurred in connection with the defense of said federal court litigation brought against him by defendant, as fixed and determined by this Court.

WHEREFORE, plaintiff demands judgment against defendant for fair and reasonable attorneys' fees with interest and costs for the legal services necessarily performed by the

undersigned counsel for plaintiff in defending said federal court litigation, to be assessed by the court in accordance with the provisions of the Community Facility Lease.

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Telephone: 577-2858

Attorneys for Plaintiff

By: s/ Darrey A. Davis
DARREY A. DAVIS

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL
CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 76-33461

HERBERT BUCHWALD, TRUSTEE,

Plaintiff

vs.

BUCKLEY TOWERS CONDOMINIUM,
INC., a Florida non-profit Corporation,

Defendant

MOTION TO DISMISS

SPECIAL APPEARANCE

Defendant, through counsel, moves to dismiss the complaint filed in this cause and says:

1. This court lacks jurisdiction of the subject matter of the complaint, since the complaint seeks to recover on a claim which was before the United States District Courts and tried by a United States District Judge. Any claim for relief arising from causes in the United States District Court should have been presented in that court and, if not presented, are barred.

2. This Court lacks jurisdiction of the defendant for the purposes set forth in the complaint and can not order the relief requested against the defendant due to such lack of jurisdiction.

3. Alternatively, there is a failure to join indispensable

parties, to wit; all members of the Buckley Towers Condominium, Inc., condominium association.

4. Alternatively, the action is barred by the doctrine of Res Judicata, Collateral Estoppel or Estoppel by Judgment, due to the finality of the Federal Judgments relied upon in the complaint.

5. Alternatively, the complainant failed to annex any judgments from the federal courts upon which reliance is placed for the claim stated in this cause, nor any enabling order from the United States District Court in support of the claim advanced in the complaint.

6. Alternatively, the complaint is a sham, frivolous and an attempt to trifle with the United States District Court, this Court and the Statutes of the United States.

7. No cause of action is stated or can be stated for the relief requested in this cause, nor does a Circuit Court in the State of Florida have authority under either the United States Constitution or the enabling portions of the Florida Constitution to award attorneys fees for matters tried under the Antitrust laws of the United States or other United States Statutes in the Federal Court system.

WHEREFORE, for the reasons stated above, it is respectfully requested that the Court:

A. Dismiss the complaint with prejudice and impose such sanctions as it deems fit and proper.

B. Alternatively, Order the plaintiff to bring his claim for attorneys fees to the United States District Court, before

the United States District Court Judge who tried the cases cited by complainant.

WHEREFORE, defendant, specially appearing to contest jurisdiction of its person and subject matter, respectfully moves that the complaint be dismissed with prejudice.

IT IS HEREBY CERTIFIED that a true copy of the foregoing was furnished by mail this 6th day of November, 1976 to Darrey A. Davis, Esq., Counsel for plaintiff, 1400 First National Bank Bldg., Miami, Fla. 33131.

Jos. S. Paglino, Esq.
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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CIVIL ACTION NO. 76-33461
Division 18

HERBERT BUCHWALD, TRUSTEE,

Plaintiff

vs.

BUCKLEY TOWERS CONDOMINIUM, INC., a Florida non profit corporation,

Defendant

ORDER ON DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came on to be heard upon defendant's motion to dismiss incorporating a special appearance for the purpose of contesting jurisdiction. The Court having heard extensive arguments of counsel, having made independent research of the law, and being fully advised in the premises, it is

ORDERED that said motion be and the same is hereby denied. The defendant shall file its answer to the complaint within fifteen (15) days from and after the date hereof.

DONE AND ORDERED at Miami, Florida, this 20th day

of December, 1976.

s/ Sam I. Silver
CIRCUIT JUDGE

Copies furnished to:

Joseph S. Paglino, Esquire
Darrey A. Davis, Esquire

Supreme Court, U. S.
FILED
MAR 7 1977
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-636

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida condominium corporation, on behalf of itself and its members-unit owners,
Petitioner,

versus

HERBERT BUCHWALD, individually and as trustee, and BUCKLEY DEVELOPMENT COMPANY, LTD.,
Respondents.

PETITIONER FOR REHEARING

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CERTIFICATE OF COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO: 76-636

BUCKLEY TOWERS CONDOMINIUM, INC., a non-profit Florida condominium corporation, on behalf of itself and its members-unit owners,
Petitioner,

vs.

HERBERT BUCKWALD, individually and as trustee, and BUCKLEY DEVELOPMENT COMPANY, LTD.,
Respondents

Comes now undersigned counsel for Petitioner, Buckley Towers Condominium, Inc. and states that the Petition for Rehearing in this cause is not for purposes of delay, there being no stay or supersedeas in effect in this cause and that, in the view of Petitioner, there are serious and compelling questions of law to be decided in this cause which should be considered by this Court on rehearing.

Respectfully submitted:

Law Office of Joseph S. Paglino
Counsel for Petitioner
88 N.E. 79th Street
Miami, Florida 33138
(305) 758-8017

By:
Joseph S. Paglino, Esq.

CERTIFICATION

IT IS HEREBY CERTIFIED that a true copy of the foregoing was mailed this 15 day of March, 1977 to Darrey A. Davis, Esq., Steel Hector & Davis, 1400 S.E. 1st National Bank Bldg., Miami, Florida, Counsel for Respondents.

By: _____
Joseph S. Paglino, Esq.

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HERBERT BUCKWALD, individually and as trustee, and BUCKLEY DEVELOPMENT COMPANY, LTD.,
Respondents

PETITION FOR REHEARING

STATEMENT

Petitioner presented its case before this Court seeking review of an Order and Judgment rendered by the United States Court of Appeals for the Fifth Circuit. The broad issue concerned in the Petition turned upon standing to sue for relief under the Sherman Antitrust Act. Upon consideration by this Court of the Petition and Brief in Support of said Petition; Brief for Respondents in Opposition and Reply Brief of Petitioner, this Court concluded that the judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed a dismissal for lack of standing, should not be disturbed. Mr. Justice Brennan, Mr. Justice Stewart and Mr. Justice Powell would grant certiorari. In view of the apparent closeness of the question and because of the compelling nature and national application of the question, Petitioner respectfully requests a rehearing of its Petition.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

In its consideration of the Petition for Writ of Certiorari filed in this cause, Petitioner may not have presented forcefully enough or with sufficient persuasion the compelling and substantial reasons for the granting of the Writ.

Mr. Justice Black, delivering the majority opinion of this Court in *Northern Pacific Railway Co. vs. United States,* 365 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958) reexamined and restated the basic premise of the Sherman Act, *at 517.*

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, *while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. . .*" (Emphasis supplied)

Housing is a basic social necessity of life in this country and world wide. Human beings can no longer live in caves nor should they be cast in the streets as a result of victimization permitted by complicated and devious documentation such as the contractual obligations present in the instant case.

It is the expressed public policy of the United States of America, through its Congress, that the people of the United States enjoy as unfettered a right to housing as is possible. It has legislated to this effect: *42 U.S.C.A. 5301 Community Development.* The Act, among other noble purposes, seeks:

> Further achievement of the national housing goal of a decent home and suitable living environment for every American Family; 42 U.S. C.A. 5301 (d)(3).

In fact, housing is no less and possibly more of a necessity than hospitals. *Hospital Building Co. vs. Trustees of Rex Hospital,* 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976). Adverse effects upon commerce due to Sherman Act violations can arise as easily from violations concerning housing as from those concerning hospitals.

In *Hospital Building Co., supra,* this Court reviewed a dismissal on the pleadings in a case involving a Plaintiff Hospital which sought expansion from 49 beds to 140 beds and claimed damages and other relief for violation of the Sherman Act by the Respondent in that case, a private tax-exempt hospital. Petitioner in that case had suffered a dismissal on the pleadings, just as Petitioner in this case had suffered a dismissal on the pleadings, without an opportunity to present proofs of any kind and, in fact, having been denied, by Court Order, the opportunity to present evidence in support of standing and jurisdiction.

Petitioner in this case has over 560 dwelling units within its complex in addition to common element property.

Hundreds upon hundreds of thousands of dollars are involved in the operations, maintenance and commercial business dealings of Petitioner. Far more money than was involved in *Hospital Building Co., supra.*

The adverse effects upon commerce, and competition which Petitioner alleged in *Buckley Towers* are more severe than those alleged in *Hospital Building Co., supra.*

The pernicious effect of the Sherman Act impure 99 year "recreation lease" and other claimed Sherman Act violations, if proven, would clearly entitle Petitioner, Buckley Towers, to the relief requested in its complaint, on its own behalf.

Nor is there any question that Petitioner was created and exists solely and exclusively to represent its membership on a collective basis and to utilize the property rights and ownership interests granted to it in its covenant with its membership to protect the property and associational interests of itself and its membership to continue in existence.

Petitioner is a highly competitive and functioning business entity, competing in national markets for supplies and services.

Petitioner has more housing units and mandatory members than many towns and communities in the several states.

A continuing illegal conspiracy and contractual entanglement alleged by Petitioner to violate the Sherman Antitrust Act on a continuing basis result in a constantly in-

creasing financial burden imposed upon Petitioner by Respondents, which prevents Petitioner from allocating monies for expansion, purchase of needed supplies, repairs, etc., and unreasonably burdens commerce and deprives competitors of the Respondents in this cause from supplying such supplies and services to Petitioner.

Far from being a mere conduit, as concluded by the 5th Circuit without proof or trial, Petitioner has the sole responsibility to allocate funds, seek funds and expend funds in the flow of commerce to effectuate its chartered purposes.

Because of the pernicious effect of the 99 year lease agreement, with its constantly escalating rentals and other obligations, Petitioner and those entities with which it must deal, suffer on a constant and ever-increasing basis. Competition is restrained and Petitioner is personally and irreparably damaged. As long as the restraint imposed by the conspiracy and unwanted lease contract in question remains in effect, interest commerce is substantially and adversely affected.

Petitioner is entitled to, at the very least, state a claim and be given an opportunity to prove its claim of per se violations. *Gulf Oil Corp. vs. Copp Paving Co.*, 419 U.S. 186, 95 S. Ct. 392, 42 L. Ed. 2d 378 (1974).

Petitioner is the principle party to the illegal contract; its unit owners-members are guarantors of its obligations, but they do not engage in the business of running, expanding and maintaining a community of more than 1000 persons.

With its commercial shops, recreation areas, dwelling

units, business offices, self contained heating and cooling plants and other municipal-type accoutrements, Petitioner is clearly an entity entitled to standing on its own and, additionally, should be permitted to seek relief on behalf of its compulsory membership *since they have no other voice to speak on their behalf. Data Processing Service vs. Camp,* 397 U.S. 150, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970); *Warth vs. Seldin,* 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

It is no answer to the horrendous and compelling situation in which Petitioner and its mandatory membership finds itself to tell Petitioner that it is a "mere conduit" for its unit owners-members and must constantly earn higher profits, and raise ever-escalating assessments against its unit owners-members to pay the newly arising illegal contract demands of respondents (a contract which is unwanted and serves absolutely no purposes or benefits to Petitioner or its unit owners that could not be obtained elsewhere for less than one-tenth of the costs imposed by the contract). The adverse effects upon commerce run into the millions of dollars and are far from unsubstantial.

Why should not Petitioner in *Rex Hospital, supra,* be forced to continually increase its charges to patients at the hospital in the manner in which Petitioner herein is forced to increase its charges rather than seek additional income through expansion? The answer lies in the practical realization that constantly increasing charges and assessments, like taxes, become confiscatory and reach a point beyond which they cannot be tolerated.

The point of extremis has been reached by Petitioner and it should be permitted standing to prove up its case in the

United States District Court in the same manner as any other litigant.

Petitioner is obligated on the 99 year recreation lease contract as a direct result of the machinations of respondents and it should be granted standing to sue respondents for the relief from the per se violations stated in its complaint.

Alternatively, the case should be remanded to permit Petitioner the right to present evidence in support of standing.

The decision of the Fifth Circuit, in denying standing to Petitioner has already resulted in harsh treatment of other condominium associations seeking relief for themselves and their membership from equally opressive Sherman Act violations. *Burleigh House Condominium, Inc., etc., et al., vs. Herbert Buchwald, etc., et al.,*—F. 2d—(1977) (Exhibit 1) and others which must now start their appellate review. See:

> Commodore Plaza at Century 21 Condominium Association, Inc., etc., vs. Saul J. Morgan Enterprises, Inc., Norman Cohen, individually and as trustee, David Morgan and Saul J. Morgan, individually and as trustee.
> Case No. 74-570-Civ-JE
>
> Condominium Association of Plaza Towers South, Inc., etc., vs. Plaza Recreation Development Corp., etc. and Plaza Building Corp., etc.
> Case No. FL-75-198-Civ-JE

Royal Bahamian Condominium Association, Inc., etc., vs. Saul J. Morgan, Trustee, Lake East, Inc., and View East, Inc., and Shores East, Inc., etc.
Case No. 75-934-Civ-CF

Villa Dorada Condominium Association, Inc. etc., Morton Wolf, individually and on behalf of others similarily situated, vs. Aventura-Villa Dorada, Inc., a Florida corporation, Arlen Realty and Development Corporation, a New York corporation doing business in New York & Florida individually, jointly and severally.
Case No. 76-1029-Civ-JE

etc.

There appears to be no question that the Fifth Circuit has accepted the proposition that the acts complained of in these series of cases involving condominium contracts, if proven, constitute *per se* violatioins of the antitrust laws of the United States. *Miller, et al. vs. Granados,* 5th Cir. 1976, 529 F. 2d 393.

If injunctive relief were granted to the plaintiff - petitioner condominium association, in its capacity as the party against which the illegal contracts are imposed and as the initial and primary target of the conspiracy, the injunctive relief would inure to each and every member since the enjoinment of the violations imposed by respondents would inure to the benefit of all. One injunction is as good as 1000 injunctions.

Conversely, of what benefit would an action by the individual membership of plaintiff-petitioner be to petitioner?

Petitioner would still be the primary obligor on the tied contract, thus spawning another series of litigation in the courts for determination of *its* liability as apart from the liability of its members.

Since petitioner has asserts it can be sued by respondents for damages as well as for specific performance. In fact, petitioner in this case *has been sued* in its corporate capacity and large damages recovered from it, as well as the imposition of injunctive relief against it compelling it to perform on the lease contract. (*Buckley Towers Condominium, Inc. vs. Buchwald, et al.,* 321 So. 2d 628 (Fla. 3DCA 1975). If petitioner can be sued by respondents to compel performance of the illegal contract, why can not petitioner sue to end the contract?

Denial of certiorari in this case sets a dangerous policy within the entire Fifth Circuit and elsewhere by giving notice to large entities that they may circumvent the antitrust laws insofar as the housing market is concerned by carefully drafting the contractual obligations to avoid standing to contest the violations by the entity charged with performance of the illegal contracts.

The "standing" question raised in this case is an artificial and illusory one and should be reversed by this Court.

CONCLUSION

Due to the questions of conflict and far reaching consequences of the case as presented in Petitioner's Brief in

Support of Certiorari and for the reasons and authorities of law cited in this Petition for Rehearing, which the Court or a member thereof, may have inadvertently overlooked in its denial of the Writ, Petitioner most respectfully requests that a rehearing be granted in this cause to review the Fifth Circuit's decision in *Buckley Towers Condominium, Inc., etc., et al., vs. Herbert Buchwald, etc.* et al., 533 F. 2d 934 (5th Cir. 1976).

Respectfully submitted:

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By: _____
Joseph S. Paglino, Esq.

CERTIFICATION

IT IS HEREBY CERTIFIED that three copies of the foregoing Petition for Rehearing have been furnished to Darrey A. Davis, Esq., Steel Hector & Davis, 1400 S.E. 1st National Bank Bldg., Miami, Florida 33131, Counsel for Respondents, by mail, in accordance with Rule 33, this 15th day of March, 1977.

By: _____
Joseph S. Paglino, Esq.

APPENDIX A

OPINION OF UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

BURLEIGH HOUSE CONDOMINIUM, INC., a non profit Florida Corporation, on behalf of itself and its membership, Plaintiff-Appellant,

v.

Herbert BUCHWALD, Individually, and as Trustee, and Burleigh House, Inc., a Florida Corporation for profit, Individually, jointly and severally, Honorable Robert Shevin, as Representative of the State of Florida, Defendants-Appellees.

No. 76-1847

United States Court of Appeals,
Fifth Circuit.

Jan. 26, 1977

A condominium association brought action for alleged violations of the Sherman Act. The United States District Court for the Southern District of Florida at Miami, C. Clyde Atkins, J., denied a motion to dismiss. The defendants appealed. The Court of Appeals held that the condominium association lacked standing to sue as a real party in interest under antitrust statutes.

Judgment vacated and case remanded for entry of order of dismissal.

Monopolies - 28(1.6)

Condominium association lacked standing to sue as real party in interest under antitrust statutes. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§1, 2; Clayton Act,§ 4, 15 U.S.C.A. §15.

Appeal from the United States District Court for the Southern District of Florida.

Before GEWIN, GEE and FAY, Circuit Judges.

PER CURIAM:

Appellant, Burleigh House Condominium, Inc. a non-profit Florida condominium association, brought this action on behalf of itself and its membership against the developer, Burleigh House, Inc., and Herbert Buchwald, Trustee of the Burleigh House Condominiums for alleged violations of the Sherman Act, 15 U.S.C§§ 1 and 2. This cause went to trial and, at the close of the evidence offered by appellant, the district court granted appellee's motion for directed verdict. The condominium association appealed on several grounds but we will not reach those issues. This Court's primary concern is whether or not the condominium association has standing to sue as a real party in interest under 15 U.S.C. § 15. This question was raised by the appellees in their motion to dismiss filed March 4, 1975 which the district court denied.

In a case with remarkably similar facts and issues this court held that a condominium association lacks standing to maintain an action under the antitrust statutes. *Buckley*

Towers Condominium, Inc. v. Buchwald, 533 F.2d 934 (5th Cir. 1976).

Therefore, we vacate the judgment of the trial court and remand for entry of an order of dismissal.